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No. ...-...

IN THE

Supreme Court of the United States

October Term, 1982

MONEX INTERNATIONAL, LTD.,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION, *et al.*,
Respondents.

FIRST NATIONAL MONETARY CORPORATION,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Questions Presented.

1. Whether in enforcing a vague statutory scheme a federal regulatory agency exceeds its authority by proceeding, not by rulemaking but by a quasi-criminal adjudication involving retroactive penalties, to change the law and establish rules having widespread application to an entire industry when the industry has justifiably relied on previous agency statements and actions.

2. Whether agency commencement of adjudication constitutes reviewable final agency action when the question is whether the agency has authority to proceed by adjudication rather than by rulemaking.

3. Whether considerations of finality limit a District Court's jurisdiction to enjoin undisputed agency violations of Constitutional and statutory rights.[1]

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[1]The parties in the Court of Appeals were Monex International, Ltd., First National Monetary Corporation, the Commodity Futures Trading Commission, its Chairman Philip McB. Johnson, its Commissioners James M. Stone, Susan M. Phillips, and David G. Gartner, and one of its administrative law judges, the Honorable George H. Painter. Pursuant to Rule 25(d)(1), Federal Rules of Civil Procedure, Commissioner Kalo A. Hineman is added herein as a party respondent.

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FIRST NATIONAL MONETARY CORPORATION,

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COMMODITY FUTURES TRADING COMMISSION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners Monex International, Ltd. ("Monex") and First National Monetary Corporation ("FNMC") respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 9, 1982.

I.
OPINIONS BELOW.

The opinion of the Court of Appeals (App. A, *infra*, 1-10) is reported at 677 F.2d 522. The transcript of the opinion of the District Court for the Eastern District of Michigan (App. B, *infra*, 11-28), rendered orally from the bench, was not reported. In addition, the March 31 (App. C, *infra*, 29) and June 9, 1982 (App. D, *infra*, 30-32) Orders of the Court of Appeals are included in the Appendix.

II.
JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered initially on May 3, 1982. A petition for rehearing was filed by Respondents (collectively referred to as "CFTC"), the *prevailing party*, on May 14, 1982. With a clarification of one word in the opinion, the mandate of the Court of Appeals issued on June 9, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III.
STATEMENT OF THE CASE.

A. The Parties.

Petitioners Monex and FNMC are companies engaged in the business of buying and selling precious metals, principally gold and silver coins, from and to the public. They conduct business with their customers either for cash or on a "leverage" (credit) basis through various programs, including their respective "Forward" programs (App. A, *infra*, 2). Monex and FNMC operate in a manner somewhat akin to a retail store that allows "lay away" purchases and in no way resemble a traditional commodity exchange such as the Chicago Board of Trade.

Since 1975 leverage merchants, including Monex and FNMC, have been subject to the jurisdiction of the CFTC.

See 7 U.S.C. §23. Previously leverage contracts were regulated by the several states, often as securities.

Monex is the nation's largest leverage merchant of precious metals, followed by FNMC, and International Precious Metals Corporation. These three major firms make up the vast majority of the lawful leverage industry. A moratorium on new firms has been declared by the CFTC, but additional firms eventually will enter this business when the CFTC carries out the Congressional mandate to lift the moratorium. *See* S. Rep. No. 97-384, 97th Cong., 2d Sess. 52 (1982).

The economic importance of the leverage industry is substantial. Between them, Petitioners' volume of transactions exceeded $2.75 billion in 1980. They currently have a combined net worth of over $34 million, assets in excess of $564 million and employ over 500 individuals. Petitioners are major participants in world silver and gold markets because of the large volume of sales they make to the public and because of their large inventories and other positions in gold and silver.

The Respondents herein are the Commodity Futures Trading Commission, its Commissioners, and one of its administrative law judges, George H. Painter.

B. The CFTC Has Chosen to Adopt a New Rule of Law Having Widespread Application Through Adjudication Rather Than Rulemaking and Monex and FNMC Will Be Irreparably Harmed by This Choice.

To an unprecedented degree, this case strikes at the heart of the structure that governs the rights and obligations of administrative agencies, regulated industries, and the judiciary. At issue is the failure of the CFTC over its seven year existence to clarify by rulemaking infamously vague

statutory standards, and the capricious resort of the CFTC to an adjudication with disastrous economic consequences for those prosecuted in order to change the law applicable to an entire industry. Also at issue is the question of when the courts, as a matter of fundamental fairness, must intercede in the administrative process to check the arbitrary resort of administrators to adjudication, particularly when an adjudication is conducted in an egregiously unfair manner.

The CFTC was created to administer the Commodity Exchange Act ("CEA"), 7 U.S.C. §§1, et seq., through enactment of the Commodity Futures Trading Commission Act of 1974. The CEA recognizes at least three types of contracts calling for the later delivery of a commodity: (1) futures, (2) leverage, and (3) cash contracts. Each is subject to a differing degree of regulation under the CEA. Futures must be executed on an organized and licensed ("designated") exchange, termed a contract market. Leverage contracts are not executed on an exchange but are subject to regulation by the CFTC to ensure their financial solvency and to prevent manipulation or fraud. Cash contracts are outside the CFTC's jurisdiction.

Leverage contracts and cash contracts in many respects resemble futures contracts because all three provide for the later delivery of a commodity and involve the extension of credit or the deferred payment of the purchase price. However, Congress has made radically different provisions for their regulatory treatment. The difference significant to this case is that futures contracts must be traded on exchanges which have been designated by the CFTC as contract markets, and leverage transactions are exempt from this requirement. *Compare* Section 4h (7 U.S.C. §6h) with Section 19 (7 U.S.C. §23). Leverage transactions were exempted

by Congress because, *inter alia*, they cannot be traded on exchanges, a fact the CFTC has communicated to Congress.[2]

Considerable confusion has evolved as to the precise definitions of a futures contract and a leverage contract and the definitional dividing line between the two. Neither Congress nor the CFTC has ever made the distinction clear. The Court of Appeals herein noted that the difference between " 'futures,' 'margin,' 'leverage' and 'forward' contracts is unclear from both an economics and a legal point of view. . . ." (App. A, *infra*, 7). The undisputed evidence below established that the regulators (including present and former Commissioners, the CFTC's Chief Administrative Law Judge and its former acting Chief Economist) and those regulated (including the Chicago Board of Trade Clearing Corporation) do not have an accurate picture of the dividing line between these types of contracts. The CFTC's current Chairman told Congress that he cannot define a leverage contract (Hearings on S. 2109 before the Subcommittee on Agriculture Research and General Legislation of the Committee on Agriculture, Nutrition, and Forestry, 97th Cong., 2d Sess. 96 (1982)) and its former Chairman told Congress that the definition of a futures contract is unclear.

The undisputed evidence below also established that the CFTC has initiated but never completed several rulemaking efforts in this regard. Since the formation of the CFTC, leverage merchants have repeatedly sought advice from the CFTC as to the proper dividing line between futures and leverage contracts but no official guidance has been given.

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[2]Former Vice-Chairman John V. Rainbolt testified before the Subcommittee on Conservation and Credit of the House Committee on Agriculture that "To move leverage contracts onto exchanges will probably kill them." Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture, 95th Cong., 2d Sess., at XIII (1978).

Rather than responding to industry rulemaking requests, on August 8, 1979 the CFTC filed administrative complaints alleging that the Monex "Forward" program and the similar FNMC "cash forward" program are illegal futures contracts in that they are not executed on a designated exchange. As an affirmative defense Monex and FNMC asserted that their programs constitute leverage contracts and are thereby exempt from any requirement that they be traded on such an exchange.

The administrative adjudication at issue here seeks to draw the dividing line between futures and leverage contracts for the first time and carries with it the probability of a devastating impact on Monex' and FNMC's businesses should any violation of the CEA be found.

It is undisputed that Petitioners' businesses are entirely dependent upon public confidence which would be devastated by the mere announcement of an adverse judgment. Thus, a cease and desist order alone will be a drastic penalty. Moreover, the CFTC seeks severe monetary and licensing sanctions against Monex and FNMC.

In view of the extreme consequences to Monex and FNMC, it is patently unfair for the CFTC to have determined to proceed in this instance by adjudication rather than rulemaking to clarify a vague statute. The unfairness of the administrative adjudication is also apparent in light of the prior misleading conduct of the CFTC.

Members of the commodities industry have been forced to rely since 1975 on the CFTC to fill in the gaps left by Congress in the CEA. The CFTC, however, has repeatedly failed to act by rulemaking, leaving law-abiding firms in a regulatory vacuum. Monex, FNMC and others have been forced to rely on CFTC pronouncements short of rulemaking to govern their business conduct.

Since 1975 and up until the filing of the administrative complaints the CFTC and its staff repeatedly indicated to Monex and (since 1977) to FNMC that it considered the transactions at issue here to be leverage transactions. Several published reports specifically described the Monex Forward as a leverage contract as did a decision of one of the CFTC's administrative law judges. A report prepared by the CFTC's Advisory Committee on Market Instruments contains a description of a leverage contract consistent with the Monex Forward.

Finally, in 1978 the CFTC broke its silence and announced its intention to ban by rulemaking all leverage programs on the basis that it could not tell the difference between leverage and futures transactions. This flaunted the Congressional directive, now thrice given, that the CFTC must regulate but cannot ban leverage transactions.[3] The adjudication against Monex and FNMC is part of this same attempt to ban leverage contracts (App. A, *infra*, 7-8),

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[3]The Senate Committee on Agriculture, Nutrition, and Forestry has recently reaffirmed this determination in the strongest terms:

> The Committee is seriously concerned, however, over the failure of the Commission to regulate leverage transactions after twice being directed to do so. The Conference Report for the Commission's 1978 reauthorization stated, 'It is the intent of the conferees that the Commission act expeditiously upon enactment of the conference substitute to regulate . . .' leverage transactions in gold and silver. (S. Rept. No. 95-1239, p. 28.) The Committee repeats its admonition and reemphasizes its intention for the Commission to regulate leverage transactions as expeditiously as possible. . . .
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> . . .
>
> . . . The Committee intends for the Commission to regulate leverage transactions, not to ban them. Again the Committee restates and clarifies the intention of the 1978 Conference Committee: the authority of section 19(d) is not to be misconstrued and exercised as a substitute for the regulation of leverage transactions. . . . S. Rep. No. 97-384, 97th Cong., 2d Sess. 52-53 (1982).

which the CFTC has publicly stated are not worth the trouble of regulating.

This case is about the CFTC's utter failure to provide definitional clarity, a clarity which must exist in some degree before the CFTC can be permitted to enforce, through substantial and retroactive quasi-criminal penalties, the statutory scheme. The CFTC has ignored express Congressional directives, has misled law-abiding members of the leverage industry and has allowed one of its administrative law judges, as the District Court found, to run roughshod over the Constitutional due process rights of Monex and FNMC.

C. Procedural History of the Case.

The suits below were instituted by Monex and FNMC seeking, in essence, (1) a declaratory judgment that certain provisions of the CEA are unconstitutionally vague, and (2) a preliminary and permanent injunction barring the CFTC from proceeding with an administrative adjudicatory hearing prior to engaging in rulemaking to define crucial terms in the CEA (App. B, *infra*, 12-13).

On December 17, 1981, after extensive briefing and oral argument, the Honorable Horace W. Gilmore of the United States District Court for the Eastern District of Michigan granted the preliminary injunction, rendering an oral opinion from the bench. The preliminary injunction restrained Respondents from proceeding with the administrative quasi-criminal hearing pending the definition of foundational terms in the CEA by a rulemaking procedure (App. B, *infra*, 23-24).

Previously, Judge Gilmore had issued a temporary restraining order at FNMC's request. Monex filed its suit in the United States District Court for the Central District of California and upon application to the Honorable A. Andrew Hauk, a temporary restraining order was issued. This latter

case was transferred to Judge Gilmore's docket after which the cases were consolidated for all purposes.

The quasi-criminal hearing was based on administrative complaints issued on August 8, 1979, which alleged that the Monex "Forward" program and FNMC's "cash forward" contracts were futures contracts not traded over a CFTC designated contract market (App. B, *infra*, 12). These complaints were issued despite the repeated requests by Petitioners for rulemaking in the leverage industry, despite the commencement by the CFTC of rulemaking proceedings concerning leverage transactions, and despite the numerous indications by the CFTC from and after 1975 that allowed Monex and FNMC to reasonably conclude that their activities were lawful (App. B, *infra*, 17). The administrative proceeding *involves no allegations of fraud, manipulation or other public harm.*

The administrative adjudication had been previously stayed for over eight months by the CFTC's own Chief Administrative Law Judge, who found that the lack of definitional clarity of the CEA could be remedied in a concurrently pending rulemaking proceeding. That stay was allowed to remain in effect for more than eight months by the CFTC although it had total discretion to vacate it at any time.

The District Court found (1) that Monex and FNMC were likely to prevail on the merits of their suits, (2) that Monex and FNMC would be irreparably harmed by the commencement of the administrative adjudicatory hearing, (3) that the CFTC would not be irreparably harmed and the public interest would in fact be served by the preliminary injunction, and (4) that the integrity of the administrative adjudicatory hearing was challenged by serious claims of due process

violations on the part of the CFTC, which claims were not controverted by the CFTC (App. B, *infra*, 20-28).[4]

Judge Gilmore found that the decision of the CFTC to proceed by adjudication rather than rulemaking, as evidenced by the filing of the administrative complaints, was final agency action which could be judicially reviewed in the context of a claim that the CFTC was exceeding and abusing its authority by adjudicating rather than rulemaking (App. B, *infra*, 14-20, 24). The District Court also found that the doctrine of exhaustion of administrative remedies did not preclude judicial review since further exhaustion would be a meaningless gesture (App. B, *infra*, 24).[5]

The District Court found that irreparable injury would occur to Monex' and FNMC's businesses in the absence of a preliminary injunction — injury which could not be remedied by the pyrrhic victory which might be achieved subsequently on appeal (App. B, *infra*, 25-27). As the Dis-

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[4]The District Court questioned whether Petitioners had received or would receive even the rudiments of due process at the hands of the agency:

> Serious allegations have been made in this case by plaintiffs with reference to the conduct and fairness of the administrative law judge assigned to this case. These were neither admitted nor denied by the defendant in oral argument and were not addressed in defendant's brief. The allegations are so serious that if true, they would raise a serious question as to the fairness of any hearing conducted in this case by the administrative law judge and a serious question as to whether the plaintiff has received or would receive due process at the hands of the administrative law judge, and I think it's particularly significant that there are many very serious allegations here which the defendant has chosen not to address and chosen merely to say it did not admit or deny. (App. B, *infra*, 25).

[5]In confirmation of the District Court's findings regarding rulemaking and exhaustion, the Administrative Law Judge ruled at the beginning of the administrative hearings in June that: (1) he would have preferred to have the issues presented handled in a rulemaking proceeding (App. E, *infra*, 33-34), but that he would deny a Motion to Dismiss based on that argument; and (2) he lacked "authority" to consider the Constitutional issues pressed before the District Court (App. F, *infra*, 35-36).

trict Court noted, the commodities industry is a highly volatile one, and public reputation is critical. The irreparable harm to Monex and FNMC from loss and damage to reputation and goodwill, loss of economic stability, loss of creditor confidence, and the unrecoverable loss of statutory and Constitutional rights, was regarded by the District Court as sufficient to warrant the granting of preliminary injunctive relief.

The importance of the role played by Monex and FNMC in the world gold and silver markets was also recognized by the District Court in granting a preliminary injunction pending an orderly, efficient and coherent process of rulemaking (App. B, *infra*, 27). Indeed, the District Court found that the public interest would be served by the preliminary injunction since an adverse decision in the administrative adjudication could have a serious and dangerous impact on the precious metals markets as a whole (App. B, *infra*, 25, 27).

On December 24, 1981, the CFTC applied to the United States Court of Appeals for the Sixth Circuit for an emergency stay of the preliminary injunction. On January 5, 1982, the CFTC filed an appeal of the District Court's written order granting the preliminary injunction.

On March 31, 1982, the Sixth Circuit Court of Appeals summarily vacated the preliminary injunction by an Order evidencing a lack of understanding of even the procedural aspects of the case,[6] and subsequently reversed the District Court's decision and factual findings on a legal ground derived from a misapplication of a prior opinion of this

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[6]This March 31, 1982 Order (App. C, *infra*, 29) purports to vacate a "stay of administrative proceedings pending appeal" entered by the District Court, although no such stay was entered, and does not mention even once the words "preliminary injunction."

Court (*FTC v. Standard Oil of California*, 449 U.S. 232 (1980) ("*Socal*")).[7]

The Court of Appeals recognized the fundamental vagueness of the statute under which Monex and FNMC were being prosecuted in a quasi-criminal proceeding. In its May 3, 1982 opinion, the Court stated that crucial terms of the CEA were "unclear from both an economics and a legal point of view" (App. A, *infra*, 7). Nevertheless, the Court held that the administrative adjudicatory hearing should proceed under the authority of this Court's decision in *Socal* because there was no reviewable final agency action (App. A, *infra*, 5-6). The decision of the Court of Appeals is in direct conflict with rulings by the Second, Seventh, Ninth, and District of Columbia Circuit Courts of Appeals.

On May 13, 1982, FNMC filed with the Court of Appeals a timely motion for stay of its mandate and the March 31, 1982 Order. Monex joined in FNMC's motion on May 24, 1982. On May 27, 1982, the Court of Appeals denied the motion for stay.[8]

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[7]After the issuance of the March 31, 1982 Order, the Respondent Administrative Law Judge scheduled the administrative hearing for June 14, 1982. The hearing was commenced on June 14, 1982, concluded on July 2, 1982 and post-hearing briefing is expected to be completed in November 1982. The issues raised in this Petition have not been rendered moot by the administrative hearing, as the administrative opinion will not issue until November or December at the earliest. Granting this Petition (and a stay pending its determination) will forestall the announcement of the decision, thus preventing the irremediable harm which would otherwise occur to Petitioners and the public.

[8]On June 1, 1982, Monex and FNMC applied to the Honorable Sandra Day O'Connor, Associate Justice of this Court, for a stay of the Court of Appeals' Mandate and March 31, 1982 Order. On June 9, 1982, Justice O'Connor denied the application. On the same day, Monex and FNMC sought to have their application for stay referred to Associate Justice William H. Rehnquist. Pursuant to this Court's practice, the application was referred to the full Court. On June 28, 1982, the Court denied Monex' and FNMC's application for a stay.

Conceding that the Court of Appeals' decision was incorrect, the CFTC, the *prevailing party* on appeal, filed a Petition for Rehearing on May 14, 1982, seeking the rewording of "incorrect assertions" in the opinion. By Order dated June 9, 1982, the opinion was clarified by substituting (App. A, *infra*, 3, line 30) the word "leverage" for the word "forward" (See App. D., *infra*, 30-31). The mandate of the Court of Appeals issued June 9, 1982 (App. D, *infra*, 32).

IV.
REASONS FOR GRANTING THE WRIT.

Petitioners submit that there are at least four issues which warrant the grant of a writ of certiorari in this case.

A. There Is a Conflict Among the Circuit Courts of Appeals on the Fundamental Issue of Whether an Administrative Agency May Be Required to Rulemake When Establishing New Law of Widespread Application.

The Courts of Appeals for the Sixth and Ninth Circuits have taken opposite positions on an issue of paramount importance to the entire scheme of administrative law. The Ninth Circuit held in *Patel v. INS*, 638 F.2d 1199 (9th Cir. 1980) ("*Patel*") and *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1982),* *petition for cert. filed* ("*Ford*") that agencies must proceed through rulemaking rather than by adjudication when an adjudication would enunciate new law or change existing law and have widespread application to

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*The Solicitor General has filed a Petition for Certiorari dated July 1982, seeking this Court's review of the holding of the Ninth Circuit in *Ford*. In the event a writ is issued in *Ford*, Petitioners urge the Court to grant certiorari herein and to consolidate this case with *Ford* for decision. At the very least, the Court should grant certiorari here pending a final decision in *Ford*.

an entire industry. In *Ford*, the FTC attempted by adjudication to impose on a car dealer a new rule regarding repossession practices. The Ninth Circuit reasoned that:

> [A]gencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application. *Id.* at 1009 [emphasis in original].

Despite the rulings of the Ninth Circuit, and under factual circumstances[10] which made a favorable ruling even more compelling here, the Sixth Circuit held in this case that the agency was completely free to commence rulemaking proceedings to define central terms in the CEA, then to "change its mind" (App. A, *infra*, 7-8) and selectively prosecute two members of the leverage industry on charges which could not have been anticipated in the absence of such rulemaking. The Court came to this conclusion despite its explicit acknowledgment that crucial terms in the CEA, undefined by statute, are "unclear from both an economics and a legal point of view," and despite the fact that "it is clear that the agency must address serious policy questions in determining under what circumstances it should permit the type of off-exchange metals contracts at issue here."

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[10]In contrast to the *Ford* case, as presented in the Solicitor General's Petition, in the instant case, prior inconsistent and misleading actions on the part of the CFTC induced Monex' and FNMC's good faith reliance on the lawfulness of their conduct. In addition, no claim has been made that Monex' and FNMC's activities were fraudulent, unfair, or deceptive.

(App. A, *infra*, 7, 9).[11] It would be particularly appropriate to apply the *Ford* rationale where, as here, the adjudication involves a quasi-criminal hearing under a statute universally acknowledged to be vague.

This case is factually quite similar to *Ford* in that (1) new law having widespread impact on an entire industry will result from the adjudication,[12] (2) the agency has a concurrent rulemaking proceeding pending and (3) the agency has refused to permit full participation by those who will be affected by the new law.[13]

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[11]The Sixth Circuit purported to find Congressional authorization for the subject adjudication in the language of Section 19(b) of the CEA (7 U.S.C. §23(b)) permitting the CFTC to make "orders" regarding leverage contracts after notice and opportunity for hearing. The analysis is incorrect. In the first place, Respondents are not proper Petitioners under this section of the CEA. Second, and more importantly, the "orders" referred to in Section 19(b) are those "designed to ensure the financial solvency of the transaction or prevent manipulation or fraud." The administrative complaints herein contain no reference whatsoever to problems of financial solvency, manipulation or fraud. Finally, the legislative history which is set forth in the record below makes it clear that Congress intended for the CFTC to regulate the leverage industry, not adjudicate it out of existence. This issue will be fully developed in a brief on the merits if this Petition for Certiorari is granted.

[12]The CFTC's attempt to distinguish *Patel* and *Ford* on the ground that it is impossible for a court to determine whether the administrative adjudication in this case will change existing law or have widespread application, is ludicrous. Even the Sixth Circuit recognized that the subject adjudication involved the definition of crucial terms in the CEA and serious policymaking by the CFTC (App. A, *infra*, 7-9). The fact is that the administrative adjudication will define for the first time that fine line which the CFTC now seeks to draw between purportedly lawful and unlawful "leverage" contracts and between all leverage contracts and futures contracts. Such definitions will have widespread application to the entire commodities industry, including those entities excluded by the CFTC from the adjudicatory proceeding.

[13]In *Ford*, the Ninth Circuit noted that the FTC denied intervention to an association of car dealers despite the clear interest of the dealers in the new law regarding repossession practices. In the instant case, the CFTC has denied intervention to International Precious Metals Corporation, another sizable dealer in the leverage industry.

In the *Ford* Petition for Certiorari, the Solicitor General suggests that clear proof of an abuse of agency discretion might justify the *Ford* ruling, but argues that the *Ford* case did not present evidence of such abuse. Such abuse is evident here. The uncontroverted evidence presented to the District Court showed agency abuse of discretion in the form of improper motives, illegal ex parte contacts between the Commission and its administrative law judge and between that administrative law judge and the prosecutorial arm of the CFTC, lopsided discovery opportunities afforded to the prosecutor by the administrative law judge, agency attempts to subvert the Congressional mandate to regulate the leverage industry, and other matters.

Of equal importance here are the considerations attendant upon this Court's decision to grant or reject review of the *Ford* decision. In seeking this Court's review in *Ford*, the Solicitor General was asked to represent the CFTC's views with respect to that case (among other agencies) (Petition, p. 8). Highlighting the Sixth Circuit's stark conflict with the Ninth Circuit, as represented by this case, the Solicitor General emphasized that in *Ford*:

> The [FTC's] holding did not reverse any prior agency precedents on which [Francis Ford] might have relied, and the only consequence of the Order under review is prospective. (Petition, p. 19).

Here, there was uncontroverted evidence before the District Court of a total reversal of policy on the part of the CFTC (App. A, *infra*, 7-8), and it is beyond dispute that the CFTC's administrative adjudication involves retroactive consequences. This is the very situation conceded by the CFTC to exemplify agency abuse of discretion because it involves "some form of severe hardship or oppression to the party subject to the adjudication under challenge." (Brief *Amicus Curiae* of Federal Administrative Agencies

in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc*, filed in *Ford*, at p. 4).

Similarly, the Solicitor General focused on the validity of the *Patel* holding, on which the *Ford* panel relied, by noting that:

> *Patel* involved an adjudication that was seemingly inconsistent with the regulation then in effect and that adopted a rule that the agency had recently decided not to issue after notice and argument. (Petition, p. 15).

The precise circumstances emphasized by the Solicitor General as justifying the *Patel* decision — proposed but aborted rulemaking followed by adjudication — were present in the case before the District Court herein. Even the Sixth Circuit recognized that such circumstances characterized the CFTC's handling of the futures/leverage definitional issue (App. A, *infra*, 7-8). However, despite its disavowance of judicial speculation, the Sixth Circuit attempted to avoid *Patel* by retreating to a rationale which had no support in the record, stating that the CFTC's reversal "may" have meant that the initial rulemaking efforts disclosed more "subtle and difficult" issues than were originally thought to be present (App. A, *infra*, 8). The District Court properly ignored any such rationale for avoiding the *Patel* decision.

The fact is that all of the elements supporting application of *Ford* and *Patel* in this case were present in the record before the District Court. All of the elements now identified by the government in the *Ford* Petition as potentially warranting the *Ford* and *Patel* results were also present in the record before the District Court. There was no basis in the

record or in law for the Sixth Circuit's refusal to follow *Patel* and *Ford*. The conflict is patent.[14]

The rulemaking issue raised by *Ford* and this case is of tremendous importance to the law governing administrative agencies, and there is a compelling need for a definitive opinion by this Court to ensure that the discretionary powers of administrative agencies will be safely exercised and confined by standards, principles and rules. The authorities, both academic[15] and judicial,[16] have stated that when rules of broad application are made by an administrative agency,

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[14]Interestingly, the Solicitor General also referenced with approval Professor Davis' analysis of *Ford* in which Davis emphasized the "combination" of (1) the superiority of rulemaking; (2) the pendency of rulemaking; and (3) the unfairness of singling out one car dealer while denying intervention to others (Petition, p. 18, citing the 1982 Supplement to Administrative Law Treatise, §7.25 at 183).

[15]Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 Duke L.J. 103; Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575 (1972); Clagett, *Informal Action — Adjudication — Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51; Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex, Scientific, Economic and Social Issues*, 71 Mich.L.Rev. 111 (1972); K. Davis, *Discretionary Justice* (Baton Rouge, 1971); Robinson, *The Making of Administrative Policy: Another Look At Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U.Penn.L.Rev. 485 (1970); Baker, *Policy By Rule Or Ad Hoc Approach — Which Should It Be?*, 22 Law & Contemp. Prob. 658 (1967); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv.L.Rev. 921 (1965); Fuchs, *Agency Development of Policy Through Rulemaking*, 59 Nw.U.L.Rev. 781 (1965); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv.L.Rev. 863 (1962); Peck, *The Atrophied Rule-Making Powers of The National Labor Relations Board*, 70 Yale L.J. 729 (1961).

[16]*Ford Motor Co. v. FTC*, *supra*; *Patel v. INS*, *supra*; *Marshall v. Western Union Telegraph*, 621 F.2d 1246 (3d Cir. 1980); *National Nutritional Foods Association v. Weinberger*, 512 F.2d 688 (2d Cir. 1975) (Mansfield, J.); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) (Friendly, J.); *cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

that determination should be by rulemaking rather than by adjudication.

This Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) ("*Chenery II*") established the criterion by which an administrative agency, which only has the authority to fill in the gaps of a statute and not to rewrite it, should proceed:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. *Id.* at 202.

Judicial intolerance of "rulemaking" by adjudication has often been evidenced. In *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966), Judge Friendly wrote:

> There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint, [citing *Chenery* II], that since an administrative agency has 'the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct,' and that *the 'function of filling in the interstices' of regulatory statutes 'should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.'*
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> * * *
>
> *And the [judicial] hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.* [citations omitted] *Id.* at 860 (emphasis supplied).

Under the facts of this case, Monex, FNMC and others have repeatedly sought the advice of the CFTC, have urged the CFTC to rulemake, and have filed rulemaking petitions with the CFTC. The CFTC has failed, indeed refused, to articulate a regulation defining the most significant terms within its regulatory jurisdiction, *viz.*, "futures" or "contract for future delivery". The CFTC concedes that the public is not being harmed by any alleged violation by Monex and FNMC but that the alleged violation is a mere technical violation. The fact is that the CFTC finds the regulation of the leverage industry to be "not worth the trouble."[17] In these circumstances it would abuse all discretion to adjudicate. The retroactive impact will be substantial if Petitioners are declared "lawbreakers." *See Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1971) (retroactive effect denied on adjudicatory determination because the party to be punished had no notice of a change in established practice).

The industry as a whole, rather than the individual respondents, should be solicited for its views on the issue, and rulemaking rather than adjudication should take place. A decision by this Court can ensure that basic considerations of fairness prevail over unbridled abuse of administrative agency discretion. As stated almost twenty years ago by Chief Justice Burger, "Considerations of basic fairness require administrative regulations establishing standards" to govern relationships with the government. *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964).

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[17]Former Vice-Chairman Rainbolt testified before Congress in 1978 that "[F]rankly, I think the judgment was made by the Commission that *leverage was not worth the trouble we were going through in trying to define it*. Therefore, I think we are coming back to you and asking you to take us off the hook." Hearings on H.R. 10285 before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture, 95th Cong., 2d Sess. 656 (1978) (emphasis supplied).

B. There Is a Conflict Among the Circuit Courts of Appeals as to What Constitutes Reviewable Agency Action When the Authority of the Agency to Act Is Challenged.

The Sixth Circuit Court of Appeals held that a federal district court is without jurisdiction to determine a claim that an administrative agency is acting in excess of its authority (App. A, *infra*, 6-7). The Court of Appeals based its ruling on a supposed absence of reviewable final agency action, citing this Court's opinion in *Socal*.[18] The Court of Appeals has misconstrued the holding of *Socal*. *Socal* held only that the sufficiency of the "reason to believe" averments of an administrative complaint could not be reviewed prior to completion of the administrative proceeding. *Socal* does not prohibit judicial review of a claim that the agency is acting in excess of its authority by filing an administrative complaint. The Court of Appeals' decision directly conflicts with the holding of the Second Circuit Court of Appeals in *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d

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[18]Throughout this action, the CFTC has urged the courts that the doctrine of exhaustion of administrative remedies also precludes judicial review of whether the agency has acted in excess of its statutory authority. Though not specifically addressed by the Court of Appeals, the District Court correctly held that the doctrine is inapplicable because further exhaustion would be "meaningless" (App. B, *infra*, 24). *See Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979) (exhaustion doctrine not applicable where validity of administrative proceeding has been challenged); *Finnerty v. Cowen*, 508 F.2d 979 (2d Cir. 1974) (exhaustion requirements dispensed with where administrative procedure under attack is the one which the agency says must be exhausted); *McKart v. United States*, 395 U.S. 185 (1969) (exhaustion not required where agency exceeded its jurisdiction); *PUC v. United States*, 355 U.S. 534 (1958) (no exhaustion necessary where fundamental Constitutional and statutory rights are being infringed); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919) and *Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970) (exhaustion not necessary where meaningful judicial review will effectively be foreclosed if the court does not intervene in the administrative proceeding).

Cir. 1981) ("*Cabrini*"). In *Cabrini*, the Second Circuit Court of Appeals held that when an agency is acting in excess of its authority, *Socal* presents no bar to judicial intervention. Thus, the institution of an investigation by an agency could be enjoined by the district court.

The Court of Appeals' decision also conflicts with an earlier ruling of the Second Circuit Court of Appeals in *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979). In *Touche Ross* it was held that a claim of lack of agency authority to order an administrative proceeding could be judicially entertained since "further agency action is unnecessary" to determine the legal authorization of the agency to conduct the administrative proceeding. *Id.* at 577.

In addition to a conflict between the Sixth and Second Circuit Courts of Appeals on this issue, the Court of Appeals' holding in this case directly conflicts with the ruling of the Seventh Circuit Court of Appeals in *Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970). In *Jewel*, it was held that injunctive relief was properly granted to restrain an agency from conducting proceedings pursuant to an administrative complaint when the issuance of the complaint was claimed to be in excess of statutory authority.

The reliance of the Sixth Circuit Court of Appeals on this Court's ruling in *Socal* also collides with the holding of the District of Columbia Circuit Court of Appeals in *Gulf Oil Corp. v. DOE*, 663 F.2d 296 (D.C. Cir. 1981). The District of Columbia Circuit Court of Appeals found that *Socal* did not preclude judicial intervention to review the procedural fairness of an ongoing adjudicatory proceeding.[19] Moreover,

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[19]In view of the claims of due process violations in this case, the decision of the Court of Appeals herein is also in direct conflict with the law as stated by the District of Columbia Circuit Court of Appeals in *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962). *Amos Treat* holds that a district court has jurisdiction to entertain an action to enjoin an agency from prosecuting an unfair revocation proceeding *solely on due process grounds*, regardless of the usual procedures for judicial review of an agency's orders.

in *Reader's Digest Assn. v. Fed. Election Comm.*, 509 F.Supp. 1210 (S.D.N.Y. 1981), as in *Cabrini*, it was held that *Socal* was no bar to judicial review of the institution of an investigation by an agency.

It has never been the law that a federal court must stay its hand when a challenge is made to the very authority of an agency to act in a particular manner, or when it is claimed that an agency is acting illegally or without providing due process. The contrary holding of the Sixth Circuit Court of Appeals in this case presents a substantial ground for seeking review by this Court in a petition for certiorari.

Moreover, if *Ford* is affirmed by this Court, as it should be, its vitality would be gutted by requiring a party to undergo an administrative hearing prior to obtaining redress in federal court when that very hearing process is shown to threaten irreparable harm. Later reversal of an adverse agency decision on the basis of *Ford* would be a hollow victory indeed.

C. The Sixth Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

A further reason for seeking certiorari in this case is to enable this Court to determine important questions of federal law which have not been, but should be, settled by the Supreme Court. This case concerns (1) fundamental due process rights of a respondent in an administrative adjudicatory proceeding, (2) the proper application of this Court's decision in *Socal*, and (3) the important question of whether a presumptively illegal administrative adjudication can be interrupted by a federal court under the rulings of the Ninth Circuit Court of Appeals in *Patel* and *Ford*, when it has been demonstrated to the district court that a rulemaking

proceeding is the only legal alternative open to an administrative agency.

The Court of Appeals has summarily ruled on important issues which involve emerging legal standards of judicial review of agency action. The Court of Appeals completely ignored the District Court's findings (App. B, *infra*, 25-27) of due process violations and rejected with virtually no consideration the District Court's finding of irreparable harm, then mechanically applied the holding of *Socal* without examining, as the District Court did (App. B, *infra*, 14-20), this Court's rationale for the decision therein.

The Court of Appeals also appears to have held that the underlying vagueness of a comprehensive administrative statute is no bar to the institution of quasi-criminal proceedings under it, even when the agency itself cannot articulate the pertinent definitions. Such a decision is directly contrary to decisions of this Court setting forth the due process standards applicable to vague statutes. *See Connally v. General Construction Co.*, 269 U.S. 385 (1926). It is also directly contrary to previous rulings by the Court of Appeals. *See Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978) (OSHA regulation void for vagueness as applied). It is crucial for this Court to determine the extent to which the Court of Appeals' decision in this case can abrogate such preexisting legal standards.

It is also important for this Court to resolve the issue of the extent to which the *Ford* and *Patel* decisions permit the halting of an administrative adjudication *before* it has resulted in a ruling, especially under circumstances such as these, where Monex and FNMC have made strong showings of irreparable harm, unfairness and statutory vagueness.

D. This Court Should Exercise Its Power of Supervision Over the Sixth Circuit Court of Appeals.

In its March 31, 1982 Order and June 9, 1982 opinion, the Court of Appeals departed so radically from the accepted and usual course of review of a lower court's order granting a preliminary injunction, as to call for an exercise of this Court's power of supervision over the actions of inferior courts. The Court of Appeals has flatly repudiated its own rulings that the granting or denial of a preliminary injunction will not be disturbed on appeal except under unusual circumstances, *NAACP v. Lansing Board of Education*, 485 F.2d 569 (6th Cir. 1973), and that a preliminary injunction is properly granted when the plaintiff "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation," *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979).

In addition, the Court of Appeals simply rejected out of hand the factual findings made by the District Court in granting the preliminary injunction. The careful analysis and balancing of interests performed by the District Court were regarded by the Court of Appeals as "clearly erroneous and wholly unsupported by the present record." (App. A, *infra*, 7).

The Court of Appeals' unwarranted substitution of its own judgment in place of the District Court's reasoned exercise of discretion, especially in light of the Court of Appeals' lack of understanding of the issues on appeal as evidenced by the March 31, 1982 Order, calls for the judicious exercise of this Court's power of supervision over the actions of inferior courts.

V.
CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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APPENDIX A.

On Appeal From the United States District Court for the Eastern District of Michigan.

United States Court of Appeals for the Sixth Circuit.

First National Monetary Corporation, Plaintiff-Appellee, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, Defendants-Appellants.

Monex International, Ltd., Plaintiff-Appellee, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, and George H. Painter, Administrative Law Judge, Defendants-Appellants, Nos. 81-1750, 82-1024, 81-1803.

Decided and Filed May 3, 1982.

Before: LIVELY and MERRITT, Circuit Judges; WEICK, Senior Circuit Judge.

Merritt, Circuit Judge. Before the administrative trial began, the District Court enjoined the defendant administrative agency from proceeding with an adjudicatory hearing to be conducted under section 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (1976), against the plaintiffs, who are commodity dealers. It did so apparently on two theories: that the plaintiffs will be unable to get a fair trial before the agency and that the question of commodity law presented by the agency's administrative complaint against plaintiffs requires resolution first by rule making procedures under section 4 of the Administrative Procedure Act. We reverse. The record does not support an advance determination that the adjudicatory proceeding initiated by the administrative complaint will be unfair. Under applicable principles of administrative law the agency itself is entitled to choose in the first instance the administrative processes

to be used in resolving the questions involved without prior judicial intervention or advance judicial clearance of its administrative processes. Thus the filing of a complaint initiating the adjudicatory proceeding does not constitute "final agency action" under section 10(c) of the APA, 5 U.S C. § 704, subject to judicial review at this time. Upon completion of the administrative process, the agency's decision and its procedures will be subject to judicial review in the normal course under Chapter 7 of the Administrative Procedure Act.

I

Plaintiff corporations are engaged in the purchase and sale of contracts for precious metals. Since 1975 Monex has sold gold and silver contracts directly to the public under a form of contract broadly labeled a "forward contract." First National Monetary Corporation has offered similar contracts, called "cash forward contracts" since 1978. Under both contracts the customer makes a down payment, and the dealer "fowards" the rest of the contract price, for which the customer is charged a fee. The contracts are usually liquidated by offsetting transactions rather than by taking delivery of the commodity under the contract. The administrative complaint alleges that the contracts are "futures" contracts and are illegal under the Commodity Exchange Act because not consummated on an exchange or regulated "contract market." Both corporations claim that these contracts are in the nature of "leverage" contracts potentially subject to regulation by the Commodity Futures Trading Commission. But they assert that the agency can only regulate the contracts through rule making procedures and not by adjudicatory administrative processes.

The federal administrative agency, the Commodity Futures Trading Commission, is charged with the responsibility of regulating "transactions involving contracts of sale

of a commodity for future delivery . . ." 7 U.S.C. § 2 (1976). These "futures" contracts are subject to extensive regulation and must be executed through a commodities exchange or "contract market." 7 U.S.C. § 6(h). Excluded from the term "future delivery," is "any sale of any cash commodity for deferred shipment or delivery." 7 U.S.C. § 2. A 1978 amendment to the Commodities Exchange Act gives the Commission authority to regulate "leverage" and "margin" contracts "for the delivery of silver bullion, gold bullion, or bulk silver coins or bulk gold coins," but "only after notice and opportunity for hearing." 7 U.S.C. § 23(b).

On September 5, 1978, the Commission Office of General Counsel submitted a memorandum to the Commission which stated that "all leverage transactions" in gold and silver are futures contracts subject to the Commission's regulatory authority. On the basis of this memorandum, the Commission solicited public comment on a proposal to regulate such leverage transactions. After analysis of public comment, which included comments by plaintiffs, the Commission announced a proposal to determine, effective January 1, 1980, that "leverage" tranactions for gold and silver "of the type presently being offered to the public" are futures contracts.

On August 8, 1979, the Commission filed administrative complaints against plaintiffs charging that they are in violation of the Act by selling forward contracts other than through a contract market. On November 20, 1979, the Commission moved back the effective date of its decision to treat forward contracts as futures contracts until June 30, 1980. On May 28, 1980, the postponement date was extended to October 1, 1982. The plaintiffs moved for a stay of proceedings against them until the October 2, 1982, date. An Administrative Law Judge granted the stay reasoning that because the Commission had decided to postpone the

effective date of its decision to regulate leverage contracts, the same rationale should extend to adjudicatory proceedings. On interlocutory review the Commission vacated the stay, finding that the Administrative Law Judge had abused his discretion by equating "forward" contracts with "leverage" contracts. The administrative trial was set for November 23, 1981.

On November 18, 1981, Monex filed suit in the Central District of California, and First National filed suit in the Eastern District of Michigan. Both actions sought to enjoin the Commission from proceeding with the adjudicatory proceedings on grounds that the Commission must act by rule before it acts by adjudicatory order. The District Court in California issued a temporary restraining order and transferred the case to the Eastern District of Michigan. The District Court in Michigan also issued a temporary restraining order pending a hearing on the preliminary injunction. Following briefing and oral argument by the parties, the District Court granted a preliminary injunction in an oral opinion from the bench on December 17, 1981. The District Judge held that further exhaustion of administration remedies by plaintiffs was not required and that the Commission must act by rule making rather than adjudication in determining the question whether plaintiffs' "forward" contracts are "futures" contracts under the statute subject to execution only through commodities exchanges. It held that the filing of the administrative complaint constitutes final agency action and that it appeared that plaintiffs could not receive a fair administrative trial and disposition through adjudicatory proceedings. The District Court issued a preliminary injunction enjoining the administrative trial and restraining the conduct of further adjudicatory proceedings on the complaint issued by the Commission, finding that plaintiffs would suffer irreparable injury in the form of economic loss and injury to good will if the questions raised

by the administrative complaint were decided by the agency through adjudicatory proceedings.

II

Section 10(c) of the APA provides for judicial review only of "agency action" (1) "made reviewable by statute" and (2) "final agency action." It provides further that "preliminary" matters "not directly reviewable" are "subject to review on the review of the final agency action." 5 U.S.C. § 704. Since the complaint here is not "made reviewable by statute," the question is whether its issuance constitutes "final agency action." The District Court held that the filing of the complaint is a "final agency action." We do not agree.

If "final agency action" means the same thing as "final decision" under § 1291, Title 28, it is clear that the act of filing a complaint is interlocutory and not "final." We do not need to strictly equate the two in order to recognize the obvious fact that many of the same considerations of finality apply in defining the two concepts. *See Pepsico, Inc. v. Federal Trade Comm'n*, 472 F.2d 179 (2nd Cir. 1972), *cert. denied* 414 U.S. 876 (1973). The Supreme Court has also suggested that similar considerations apply in its recent decision concluding that the filing of an FTC administrative complaint initiating an adjudicatory proceeding against the oil companies is not "final agency action," *Federal Trade Comm'n v. Standard Oil of California*, 449 U.S. 232 (1980). Plaintiffs argue that *Socal* is not in point because here plaintiffs are attacking the "authority," the "power," of the agency to proceed by filing an administrative complaint preliminary to an adjudicatory proceeding. *Socal* cannot be so easily distinguished. Similar arguments were made there. The claim in *Socal* was that the agency acted beyond its delegated authority in issuing the complaint because it had not made necessary precomplaint findings. The

Supreme Court discussed the finality considerations as follows:

> Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. . . . Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. . . . Finally, every respondent to a Commission complaint could make the claim that Socal had made. Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes.

Socal, supra, 449 U.S. at 242-243. Similar considerations apply here. In addition, as explained below, we disagree with the holding of District Judge Gilmore that the issuance of the complaint is so plainly beyond the jurisdiction of the Commission that the administrative proceedings must necessarily turn out to be void whatever their outcome.

Plaintiff makes two basic arguments, both of which the District Court apparently accepted, that the complaint initiating adjudicatory proceedings is so plainly beyond the Commission's power that a court should intervene at the outset to declare the proceedings a nullity. We disagree with both arguments.

First, plaintiffs ask us to assume in advance of the administrative trial and disposition that they will lose and that the administrative proceedings are "futile" (Brief of First National Monetary Corp., 45-47), that the administrative agency will act illegally, that a retroactive order will be entered punishing them unfairly and that they will be harmed irreparably before they can obtain judicial review and redress (*id.* at 57-70). The District Court appears to have accepted some or all of these propositions in its oral decision from the bench enjoining the agency in advance from hear-

ing the case. We cannot accept these propositions in the absence of an administrative record which indicates that they are true. To the extent that the District Court in its oral disposition rested its decision on such predictions regarding the future course of administrative proceedings, we conclude that its findings are clearly erroneous and wholly unsupported by the present record. We do not know at this point what course the administrative proceedings will take, but we are not empowered to intrude into the administrative proceedings in advance on the basis of such assumptions. As the Supreme Court noted in *Socal* the plaintiffs will not be "bound by the Commission's decision until judicial review is complete," 449 U.S. at 24, and the necessity of first litigating the issues before an administrative agency does not constitute irreparable injury, *id.* at 244.

The plaintiffs' second argument is that the agency can do nothing in the way of adjudication respecting the plaintiffs' off-exchange "forward" or "leverage" metals contracts until the agency issues detailed regulations governing the conduct in question. To the extent that the court below accepted this argument before the administrative process was completed, it erred. Although it is true that the difference between "futures," "margin," "leverage" and "forward" contracts is unclear from both an economics and a legal point of view and although it is clear that the agency must address serious policy questions in determining under what circumstances it should permit the type of off-exchange metals contracts at issue here, we see nothing in this record to support at this time the District Court's conclusion that rule making procedures are inherently more productive of efficient policy making in this area than are adjudicatory proceedings. Where administrative officials are uncertain of the correct answer to a regulatory problem in the abstract, it is often not unreasonable for them to proceed on a case by case basis. The fact that the Commission changed its

mind and decided to investigate the problem in an adjudicatory proceeding does not mean that the Commission has decided to "railroad" the plaintiffs. It may simply mean that the Commission believes that an adversary proceeding with a factual record is the best way to define and resolve the issues because the initial effort at rule making indicates that the issues are more subtle and difficult than was first believed.

Unless Congress has acted to make the requirements of the commodities statute inoperative until the Commission issues implementing regulations applicable to commodities contracts for precious metals, we believe we must follow the general principle laid down in *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947). There the company attacked the agency's administrative order entered after an adjudicatory hearing on grounds that the agency should have acted by rule under section 4 of the Administrative Procedure Act rather than by order under section 5. The Court said:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant regidifying its tentative judgment into a hard and fast rule. . . . In those situations, the agency must

> retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceedings by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administration agency.

Id. at 202-03.

Contrary to plaintiffs' argument, Congress itself has not required the Commission to engage in rule making respecting "margin" and "leverage" contracts prior to adjudication. The statute permits cash contracts off the commodities exchanges, but requires futures contracts to be executed through the exchanges. With respect to "margin" and "leverage" contracts — terms left undefined by the statute — Congress has provided with respect to most commodities that such contracts are illegal. 7 U.S.C. § 23(a). With respect to "margin" and "leverage" contracts for gold and silver Congress has provided as follows:

> No person shall offer to enter into . . . any transaction . . . under a standardized contract described in subsection (a) of this section, contrary to any rule, regulation, *or order* of the Commission designed to ensure the financial solvency of the transaction or prevent manipulation or fraud: Provided, that such rule, regulation, *or order* may be made only after notice and opportunity for hearing.

7 U.S.C. § 23(b) (Emphasis added). Under this provision of the statute, Congress does not expressly or by implication limit regulation of gold and silver "margin" and "leverage" contracts to rule making. It delegates authority to regulate by "order," i.e, adjudicatory proceedings, as well. We find nothing in the text of the statute or in the legislative history of the statute indicating an intent to prohibit the Commission from regulating metals contracts by

adjudication. Nothing in the statute indicates that Congress intended for the Commission to act by rule before it acts by order so long as the parties are given notice and an opportunity to be heard.

The Circuit and District Court cases cited by plaintiffs for the proposition that the agency must act by rule before it acts by order are not in point. In *Patel v. Immigration and Naturalization Service*, 638 F.2d 1199 (9th Cir. 1980) and *Ford Motor Company v. Federal Trade Commission*, 654 F.2d 599 (9th Cir. 1981) (withdrawn from publication for reconsideration), the court had before it final agency decisions after adjudicatory hearings, including complete factual administrative records. The Court did not have to speculate about the facts, the nature of the industry, the administrative standard to be applied, the remedy or sanction to be imposed and the effect on non-parties similarly situated. This distinction is crucial. Judicial insistence on clear administrative findings and reasoned decision making as a condition of review and enforcement is irrelevant if courts are going to decide the correctness of the agency's procedures, remedies and substantive rules and principles before the agency ever hears the case. It may be that the agency's findings will be erroneous because the agency's law respecting commodities contracts will be erroneous. But we do not know at this point. We cannot decide that question before the findings are made and the law is developed. We will have "final agency action" to review when that process is complete. The issuance of the complaint is not final.

Accordingly, the judgment of the District Court is reversed.

APPENDIX B.

Transcript of Opinion Rendered From the Bench by the Honorable Horace W. Gilmore, for the United States District Court, Eastern District of Michigan.

In the District Court of the United States for the Eastern District of Michigan, Southern Division.

Monex International, Ltd., and First National Monetary Corporation, Plaintiffs, vs. Commodity Futures Trading Commission, Defendant. Civil Action No. 81-74572.

. . . on December 17th, the Division respectfully requests that your Honor immediately thereafter convene a telephonic conference to schedule the inquiry into discovery matters and the haring on the merits unless we are enjoined from doing so. The Division of Enforcement would respectfully request that your Honor conduct the inquiry into the discovery matters in advance to the Christmas holidays and schedule the hearing on the merits to commence as soon thereafter as is practically possible.

Yes, I have seen that letter, yes. All right, sir. Well, we'll take a — I'll ask you to stick around until I either come back and tell you I have a decision or until I tell you to come back another time. So if you will just wait around, please.

(Court recessed at 3:40 P.M.)

(Court reconvened at 4:20 P.M.)

THE COURT: First of all, I want to thank all of you for the quick briefing that was done and for the assistance all of the lawyers have given me in trying to decide this very interesting and complex motion for preliminary injunction. I would have much preferred to have had the time to take this under advisement and spend the time that one likes to spend on a case like this that writing a formal opinion because I think the issues are of tremendous importance, but unfortunately because of the pressures of time I was unable to do that and I will therefore have to render an opinion from the bench, which will not be as polished nor as complete nor as thorough as I would like it, but I think hopefully will dispose of the issues in this case.

Now, this action arises out of the defendant Commission's pending administrative adjudication brought up against plaintiffs Monex and First National Monetary Corporation. The plaintiffs are in the business of buying and selling precious metals through certain contracts termed forward or cash forward contracts, and in August of 1979, the defendant Commodity Futures Trading Commission instituted administrative proceedings against both defendants — both plaintiffs.

The complaint filed against First National Monetary Corporation alleges that FNMC's cash forward contract is in reality a contract for a future delivery of a commodities within the meaning of the Commodities Exchange Act, 7 U.S.C., paragraph 1 and following. The complaint alleges that the sale of these contracts violates the section 4h of the Act, (7 U.S.C. 6h) because they are not sold through a member of a contract market.

The complaint against Monex states that Monex' forward contract is a contract for the future delivery of a commodity, and the sale of this contract violates section 4h because the contracts are executed otherwise than by or through a member of a contract market.

The complaints filed here by Monex and FNMC allege that the administrative proceeding being maintained by the defendant is unlawful in that it violates the due process clause of the United States Constitution and the Administrative Procedures Act and the parties are before the Court on plaintiffs' motion for preliminary injunction.

The complaints allege that injunctive relief is necessary because one, the Commission unlawfully seeks to accomplish the promulgation of a rule which will have wide spread application through the use of an adjudicatory proceeding.

Two, statutory provisions which the Commission seeks to impose on the defendant are void for vagueness on their face and as applied to plaintiffs.

Three, the administrative proceedings are being conducted in violation of the due process clause to have the Constitution.

Four, the prosecutorial arm of the Commission; that is, the Division of Enforcement, has engaged in prosecutorial misconduct.

Five, the Commission has previously identified the plaintiffs' contracts as leverage contracts and therefore is now estopped from proceeding against plaintiffs on the ground the contracts are futures contracts.

Six, the nature of plaintiffs' business makes the announcement of an adverse administrative determination a disaster which will irreparably harm the plaintiffs.

In order to obtain preliminary injunction, the plaintiffs must meet the following criteria. One, substantial likelihood that the moving party will prevail on the merits.

Two, irreparable injury. Three, overriding harm to plaintiff relative to defendant if relief is granted, and four, the public interest is served by the issuance of the relief.

The defendant maintains that the plaintiffs have failed to meet the criteria for a preliminary injunction. The defendant's principal arguments are the plaintiffs have not demonstrated a strong likelihood of success on the merits because, one, plaintiffs' failure to exhaust their administrative remedies bars judicial interventional at this time, and two, the issuance of an administrative complaint is not final agency action and therefore is not subject to review.

Judicial review of agency action is governed by the standards set forth the Administrative Procedures Act, 5 U.S.C., 701-706. The standards for judicial review set out by the APA apply unless, one, statutes preclude judicial review, or two, agency action is committed through agency discretion by law, 5 U.S.C. 701(a).

Section 704 of the APA specifically defines what agency actions are adjudicable, and it says, quote: Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a Court are subject to judicial review. A preliminary procedural or intermediate rule not directly reviewable is subject to review on the review of a final agency action. Since the Commodities Exchange Act does not make the issuance of a complaint or the decision to proceed with an adjudication reviewable, the agency's action can only be reviewed the it's a final agency action.

The defendant argues that plaintiffs seek judicial review of the facts and circumstances surrounding the issuance of the complaint and argues the Supreme Court is specifically held that the issuance of a complaint is not final agency action in Federal Trade Commission versus Standard Oil of California, hereinafter known as the Socal case.

In FTC versus Socal, the FTC served Standard Oil with a complaint averring that the Commission had reason to believe that the company was violating section 5 of the Federal Trade Commission Act, 15 U.S.C. 5 — 45. The Commission's authority to issue the complaint was contained in section 5b of the Act which provided in part, quote: Whenever the Commission shall have reason to believe that any person had been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, it shall issue and serve upon such person a complaint stating its charges. That is found in — close quote, found in 15 U.S.C. 45(b).

Standard Oil filed a complaint against the Commission in District Court alleging that the Commission had issued its complaint without having reason to believe that Socal was violating the Act. Socal sought an order declaring that the complaint was unlawful and requiring the complaint to be withdrawn. In support of this allegation the complaint

was issued without "reason to believe," Socal outlined a series of events, basically charging that the political pressure for an explanation of the gasoline shortage of 1973 forced the Commission to issue the complaint.

The complaint pointed to such things as the report by the Office of Energy Advisor of the Department of Treasury which are recommended that the complaint be withdrawn, and several failures of Commission's counsel to comply with orders of the ALJ to identify witnesses and documents on which the Commission intended to rely. The ALJ's recommendation that the complaint be withdrawn — and the ALJ's recommendation the complaint be withdrawn until more fully investigated.

The Supreme Court held the agency's action was not reviewable because the averment in the complaint that the Commission had reason to believe that Socal was violating the Act was not subject to judicial review because it was not a final agency action, and the Court stated, among other things, quote: The Commission averred in its complaint that it had reason to believe that Socal was violating the Act. That averment is subject to judicial review before the conclusion of the administrative adjudication only if issuance of the complaint was, quote, final agency action or otherwise was directly reviewable under 10(c) of the APA 5 U.S.C. 704. We conclude that the issuance of the complaint was neither.

Further on in the opinion, the Court said in summarizing: In sum, the Commission's issuance of the complaint averring reason to believe that Socal was violating the Act is not a definitive ruling or regulation. It had no legal force or practical effect upon Socal's daily business other than the disruptions that accompany any major litigation. And immediate judicial review would serve neither efficiency nor enforcement of the Act. These pragmatic considerations

counsel against the conclusion that the issuance of the complaint was final agency action.

Plaintiffs argue that the reasoning in Socal is not applicable. They claim they are not challenging the averments of the administrative complaint; instead they claim they are challenging the legality of the adjudication in light of the actions of the Commission indicating they would not challenge the forward type contracts.

Plaintiffs maintained that the issues raised by the complaint in this Court are different from the issues raised by the complaint in the administrative proceeding and argue that their Complaints are challenges to the Commission's authorities, not challenges to the administrative complaint by the Commission.

The plaintiffs argue that the instant case presents issues similar to those in *U.S. v. Cabrini Medical Center*, 639 F. 2d 908, 2nd Circuit, 1981. There a former employee of the Cabrini Medical Center alleged that he was discharged because of mental disability. The Government contended that this Department of Health and Human Service's Office of Civil Rights was authorized to investigate the employee's complaint under the Rehabilitation Act of 1973.

The Court concluded the Government did not have authority to investigate the hospital because the statutory scheme was not meant to authorize the government to investigate where the primary objective of the Medicare and Medicaid payments was not that of providing employment.

The Court noted on page 190 of 639 F. 2d, quote: Nor does the recent decision in Federal Trade Commission versus Standard Oil California benefit the government. The plaintiff oil companies in that case sought judicial review of an FTC complaint where no one questioned the statutory authority of the agency to investigate those companies. The Court held that the complaint was not a reviewable final

order and that the agency should have the choice to evaluate the facts itself to determine if the charge had merit. Here only the purely legal question of statutory jurisdiction was before the district court. Nothing in the Office of Civil Rights intended investigation might reveal — that the intended investigation might reveal could create jurisdiction if it did not exist on the facts before us. Were not second guessing OCR's investigative skills but rather determining whether it seeks to exercise those skills in an unauthorized manner. We see no point in permitting the government to institute an investigation with its attendant inconvenience, expense, and annoyance if there is and can be no authority for undertaking it, close quote.

In other words, the Court in Cabrini Medical Center was construing language which indicated that federal agencies are to concern themselves with investigation and enforce meant only where the primary objective of federal financial assistance is to provide employment.

In the instant case, there is no question the Commission has authority to issue the type of complaint it is issued. Section 6(b) of the Act, 7 U.S.C. 9 provides in pertinent part, quote: If the Commission has reason to believe that any person is violating or has violated any of the provisions of this chapter or of rules, regulations or orders of the Commission, it may serve upon such person a complaint stating its charges in that respect, close quote.

Plaintiff claims that given the vagueness of the Act and Commission's actions in first proceeding with rule making and indicating that plaintiffs' contracts were within the category known as leverage contracts, the Commission cannot bring an adjudication alleging that the plaintiffs' contracts are not leverage contracts but instead are contracts for future delivery which must be sold through a member of the contract market under section 4h of the Act.

Plaintiffs are basically claiming the contracts they offer are leverage contracts, that the Commission stayed a rule making procedure relating to leverage contracts and that the Commission cannot define plaintiffs' contracts as contracts for future delivery through an adjudication but must instead proceed to define the terms "leverage contract" and "contract for future delivery" through rule making proceeding — procedures. In this sense plaintiffs are challenge the Commission's authorities to issue the administrative complaint with the adjudication.

I think this case, the instant case, is closer to the situation found in Cabrini Medical Center, although it certainly is not identical with it. In Cabrini the Court was construing the statutory limits of the government's authority to conduct an investigation. Here the Commission does have the authority to conduct the investigation — to conduct adjudications. However, plaintiffs are challenging the authority of the Commission to proceed with this adjudication, and therefore, as I say, I think the case, although not on all fours, is much closer to Cabrini than to Socal.

Other policy reasons cited by the Court in Socal are not present here. In Socal the Court noted that judicial review to determine whether the Commission had the requisite reason to believe would delay resolution of the ultimate question whether the Act was violated.

Here review of the decision to proceed with an adjudication without clarifying the Act through rule making would not necessarily delay resolution of the ultimate issue. In fact, after the adjudications, plaintiffs could be expected to challenge the adjudication on the ground it was an abuse of discretion for the agency to proceed by adjudication.

In addition, the Court in Socal noted that every respondent to an FTC complaint could make the same complaint that Socal had made. That situation is much less likely in this

case. Once the rule making proceedings go through, no one will be able to bring the same challenge.

Further, the plaintiffs in the instant case have also complained of a denial of due process through the agency's inconsistent actions. It is unlikely that the agency will repeat the same series of events that led up to the issuance of the complaint in this case.

I think there is a distinction between this case and Socal. The critical distinction here is that plaintiffs are challenge the agency's authority to proceed in this manner. The complaint filed by FNMC, for example, alleges the four following — four — the four following grounds for issues of injunctive relief.

One, the Commission is required to proceeding by ruling making in attempting to subject FNMC's cash forward contracts to the Commission's authority.

Two, the Commission lacks jurisdiction to proceed through adjudication in challenging FNMC's cash forward contracts.

Three, by proceeding through adjudication the Commission is violating FNMC's due process rights.

And four, the Commission is barred by estopped from challenging FNMC's cash forward contracts through adjudication.

In deciding to — I therefore, hold that in deciding to proceed by adjudication rather than rule making, the defendant is taking a final agency action which this Court can consider, and that this is enough of a distinction to warrant a finding that this final agency action and thus reviewable, and Socal is not applicable in this case.

Now, with reference to rule making versus adjudication, the Supreme Court has said that an administrative agency is not precluded from announcing new principles in the adjudicative proceeding and that the choice between rule

making and adjudication lies within the first instance within the agency's discretion. *NLRB v. Bell Aerospace*, 416 U.S. 267, 279 — 294, a 1974 case, but the agency's discretion is not unlimited, as was pointed out in Bell Aerospace at 249 — 294, there may be situations where the agency's reliance on adjudication would amount to abuse of discretion.

The Supreme Court has not drawn clear lines indicating when the agency's reliance on adjudication would amount to an abuse of discretion. The cases upholding the right of the agency to proceed by adjudication do hint at situations in which the decision to adjudicate might be considered abuse of discretion.

In *SEC v. Chenery Corporation*, 332 U.S. 194 (1947) (Chenery II), the respondent argued that in an adjudication the SEC could not apply a general standard it had formulated for the first time in that proceeding.

The Court rejected that argument stating: The function of filling in the interstices of the Act should be performed as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. Any ridig requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into hard and fast rules. Or the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule. In these situations, the agency must retain power to deal with the problems on a case-by-case basis if the ad-

ministrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. I do not think that this case, however, is one for case-by-case evolution of statutory standards.

As Chenery II suggests, there are problems that are appropriate for resolution by adjudicative proceedings but not the ones we have here. The problems that are not specialized or problems which are foreseeable clearly should be resolved by rule making proceeding.

Similarly, the language in Bell gives some indication when an agency should proceed by adjudication. In Bell Aerospace, the Court said, quote, on page 295 of 416 U.S.: The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result (that is in the Court's conclusion that the Board's judgment that adjudication was proper was to proceed — was proper to proceed was entitled to gread deference). It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements, nor are fines and damages involved here.

And I might emphasize and underline, as I recall, it is clearly applicable to this case, the Supreme Court's pointing out that Bell Aerospace was a case in which there some new liability — it was not a case in which some new liability was sought to be imposed for past actions taken in good faith reliance on Board pronouncements. That is very close to this situation.

Plaintiffs here argue that they have relied on the agent's past policy regarding leverage contracts and that they will face substantial adverse consequences in the adjudication.

They also argue that rule making is more appropriate here because it would allow all parties to participate and make Commission policy consistent with its leverage transaction regulatory efforts and because the issue is not specialized.

In *Patel v. Immigration & Naturilization Service*, 638 F. 2d 1199, 9th Circuit, 1980, plaintiffs sought a review of the decision of the INS, the Immigration and Naturalization Service, to deport him. But Patel applied for entitlement to stay in the U.S. because of the, quote, investor exemption, close quote.

The INS determined that Patel did not qualify for the investor exemption because an alien's investment must tend to expand job opportunities. In requiring that Patel's investment must tend to expand job opportunities, INS purported to be following two of its previous decisions (In re Heitland and In re Ruangswang).

The investor exception was initially created by regulation. The regulation required that an alien engage in an agricultural or commercial enterprise in which he had invested a substantial amount of capital. INS then promulgated a new regulation which required an investment of $10,000 and one year's of experience.

After the new regulation was promulgated, the Board decided Heitland under the earlier substantial amount of capital regulation and overruled earlier interpretations of ''substantial'' and stated that the investment must tend to expand job opportunities.

In dicta, Heitland had stated that expanding job opportunities requirement would also apply to the new regulations. The Board then applied the job-creation criteria Heitland to another case, In re Ruangswang, arising under an HEW regulation.

The issue in Patel was whether the Board could rely on Heitland to add a job-creation criteria to the facially clear

1973 regulation. The Court stated that issue was whether the Board had used its discretion by choosing to announce the job-creation criteria in the adjudicatory setting of Heitland rather than waiting for INS rule making and by applying the job-creation criterion to the Patel. The Court concluded that if the INS wished to add job creation criterion, I had it should have done so by the rule making procedure.

Similarly, in *Ford Motor Company v. Federal Trade Commission*, 654 F. 2d, 599, the 9th Circuit, 1981, the Court held that the agency should adopt a rule of law by rule making where the case before it called for a general standard, not a case-by-case determination.

Quoting from Patel, the Court said, quote, at page 601 of 654 F. 2d: The thrust of the Patel holding, therefore, is that agencies can proceed by adjudication to enforce discrete violations of existing laws where the effective scope of the rule's impact will be relatively small, but an agency must proceed by rule making if it seeks to change the law and establish rule of wide spread application, close quote.

The Court also cited from Davis, Administrative Law Treatise, section 7.25 for the proposition that courts should require agencies is just rule making procedures when the agency retroactively adopts new law and where the parties relied on the precedents.

The holdings of Ford and Patel are clearly applicable to the existing adjudication. The Commission is seeking to establish a rule in the instant adjudication that will apply to every member of the cash forward industry; that is, defining the cash forward contract as a future within the meaning of the Act. This would clearly have the effect of requiring on exchange trading of virtually every contract for the deferred delivery of an article which contained any contingency that could prevent delivery.

Rule making is appropriate here because the issues could be easily incorporated into the existing leverage rule mak-

ing, and adjudication, I feel, would cause severe hardships to the plaintiffs. Rule making is the only fair way of proceeding to establish a new rule that would have wide spread application, and I think the Commission is circumventing the rule — proposing to circumvent the rule making procedures by attempting to promulgate the precise rule it is proposing through adjudication.

It is, therefore, clear to me that the defendant should legally be required to proceed first with rule making rather than with adjudication.

Now, the defendant contends that the plaintiffs have an obligation exhaust administrative remedies and therefore preliminary injunction should not issue.

Exhaustion is not required here because the filing of the complaint represents a Commission's determination that it can proceed by rule making. Furthermore, this is a case where there is no need for exhaustion because the adjudicatory process itself is the object of the challenge. That being so, exhaustion would be a meaningless gesture.

The issue is whether the proceeding itself can go on, and the Court has concluded that it should not. Therefore, the Exhaustion Doctrine is inapplicable.

As was pointed out in *Ross v. SEC*, 609, F. 2d 570, at page 577, 2nd Circuit, 1979, quote: Appellants challenge the legal authority of the Commission to proceed against them. While the Commission's administrative proceeding is not plainly beyond its jurisdiction, nevertheless, to require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking. Agency action is unnecessary to enable us to determine the validity of the challenged practice. There is no need for the exercise of discretion on the part of the agency, nor for the application of agency expertise, close quote. It is therefore clear that exhaustion is not required here.

Serious allegations have been made in this case by the plaintiffs with reference to the conduct and fairness of the administrative law judge assigned to this case. These were neither admitted nor denied by the defendant in oral argument and were not addressed in defendant's brief. The allegations are so serious that if true, they would raise a serious question as to the fairness of any hearing conducted in this case by the administrative law judge and a serious question as to whether the plaintiff has received or would receive due process at the hands of the administrative law judge, and I think it's particularly significant that there are many very serious allegations here which the defendant has chosen not to address and chosen merely to say it did not admit or deny.

There are other additional reasons for showing the possibility of irreparable harm and the likelihood the plaintiffs would prevail on the merits.

Plaintiff primarily argues that its circumstances within the gold and silver commodities industry is such that agency action here would destroy its reputation to such a degree that the public would not deal with it. Further, banks would not finance it.

The commodities industry is a highly volatile one, and particularly as to trading in gold and silver public reputation is critical. Trades with the dealer are made, cash is paid and the purchaser must await the delivery of the precious metal. If a cloud is cast over a broker, public apprehension develops as to whether the broker can make deliveries.

Plaintiffs claim as to irreparable harm unrecovered economic loss, unrecovered non-economic property right; that is, goodwill, unrecoverable loss of statutory and constitutional rights, loss and damage to reputation, loss of economic stability, loss of customer goodwill, loss of creditor confidence and serious impact on gold and silver market in the United States.

They also advance other claims of irreparable harm; such as, expense and burden of defending the action. Clearly the defense and burden of expending — of defending the agency action does not establish irreparable harm, but certainly I think there is a sufficient claim to irreparable harm that is made here. There has not been a serious meeting of in argument to say that there has been a showing of the possibility of irreparable harm.

Now, the defendant says that injury to reputation cannot establish that — reputational damage cannot establish irreparable harm and a — but the cases they cite are factually distinguishable and not persuasive.

The defendant says in his brief the Supreme Court has similarly held that damage to good will and reputation occasioned by administrative proceedings does not constitute irreparable injury, citing *Sampson v. Murray*, 415 U.S. 61, and *Meyers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41.

Sampson involved the discharge of an employee of the government who contested procedures employed during discharge proceeding. The government discussed the unique nature of the government concerns in matters of temination and balanced them with the plaintiff's allegation of humiliation and damage to personal reputation.

At page 91 of 415 U.S., the Court stated, quote: Respondent's complaint also alleges, as a basis for relief, the humiliation and damage to her reputation which may ensue. As a matter of first impression it would seem that no significant loss of reputation would be inflicted by procedural irregularities in effectuating respondent's discharge, and that whatever damage might occur would be fully corrected by administrative determination requiring the agency to conform to the applicable regulations. Respondent's claim here is not that she could not, as a matter of statutory or administrative right, be discharged, but only that she was entitled

to additional procedural safeguards in effectuating the discharge.

Assuming for the purpose of discussion that respondent made a satisfactory showing of loss of income and had supported of claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case, close quote.

And in referring to "this type of case," the Court meant employment termination cases where there is a strong policy of not enforcing personal service contracts and allowing the government to handle its own internal affairs.

The present case is not such a case, and even if it were, the statement as to reputation and irreparable harm was merely dicta. The Court has — with regard to Meyers, the Court makes only a tangential comment about irreparable harm and reputation, and it is not good authority for the present case.

The Court concludes that there is a sufficient likelihood of irreparable harm along with the substantial likelihood that the moving party plaintiff will prevail in the merits. The overriding harm to the plaintiffs relative to the defendants is outweighed strongly in favor of the plaintiffs, and certainly the public interest and the opinion of the Court would be served by the issuance of this injunction. Therefore, the Court will issue the preliminary injunction as requested.

MR. MILLS: Your Honor —

MR. LEMON: Your Honor, would the Court like counsel do prepare a preliminary injunction?

THE COURT: Please prepare it, submit it to the other side.

MR. MILLS: Your Honor, may I ask for a stay of the order pending appeal?

THE COURT: Well, that depends on what you want in terms of a stay. If you want a stay that will allow you to proceed with the hearing and proceed with the discovery as proposed in the letter by the Enforcement Division to the the administrative law judge, no, if that's what you mean.

MR. MILLS: That's what I mean.

THE COURT: Then I deny the stay. I think the injunction issues immediately and will remain in effect until satisfied by an appellate court.

MR. MILLS: Thank you, your Honor.

MR. TUCKER: Thank you, your Honor.

MR. SILVER: Your Honor, it's with the stipulation that these cases may be consolidated for all purposes.

THE COURT: I have no problem with that.

MR. SILVER: Fine. We'll prepare an order for your Honor.

(Whereupon Court was adjourned)

* * *

APPENDIX C.

Order.

United States Court of Appeals for the Sixth Circuit.

First National Monetary Corporation, a Michigan Corporation (81-1750 & 82-1024), and Monex International, Ltd. (81-1803), Plaintiffs-Appellees, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, and George H. Painter, Administrative Law Judge, Defendants-Appellants, No. 81-1750, No. 81-1803, No. 82-1024.

Filed: March 31, 1982.

Before: LIVELY and MERRITT, Circuit Judges; WEICK, Senior Circuit Judge.

After oral argument on the merits and upon consideration of the briefs and the record in this case, the Court hereby vacates and sets aside the stay of administrative proceedings heretofore entered by the District Court. Considering the factors of likelihood of success on appeal, irreparable injury, injury to the public interest and the adequacy of administrative and legal relief, the Court concludes that the District Court erred in staying administrative proceedings pending appeal.

Accordingly, it is ORDERED that the stay of administrative proceedings heretofore entered by the District Court is vacated.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman,
Clerk

APPENDIX D.

Order.

United States Court of Appeals for the Sixth Circuit.

First National Monetary Corporation, Plaintiff-Appellee, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, Defendants-Appellants.

Monex International, Ltd., Plaintiff-Appellee, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, and George H. Painter, Administrative Law Judge, Defendants-Appellants, Nos. 81-1750, 82-1024, 81-1803.

Filed: June 9, 1982.

Before: LIVELY and MERRITT, Circuit Judges; WEICK, Senior Circuit Judge.

Subsequent to the decision of this Court in this case filed May 3, 1982, the appellant timely petitioned the Court pursuant to Rule 40(a), Fed. R. App. P., for the Court to clarify its opinion. In the recitation of facts the Court stated at page 4-5 of its opinion:

> On November 20, 1979, the Commission moved back the effective date of its decision to treat *forward contracts* as futures contracts until June 30, 1980. On May 28, 1980, the postponement date was extended to October 1, 1982. (emphasis added)

This statement refers to decisions made by the Commission in the context of its rulemaking proceeding concerning leverage contracts involving gold and silver bullion and bulk coins. The question whether the "forward" or "cash forward" contracts offered by the plaintiffs are leverage contracts is an issue to be resolved in the administrative ad-

judicatory proceeding. To avoid any ambiguity the opinion of this Court should be clarified by substituting the words "leverage contracts" for the words "forward contracts." In all other respects the court adheres to its original opinion.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

JUDGMENT.

United States Court of Appeals for the Sixth Circuit.

First National Monetary Corporation, Plaintiff-Appellee (81-1750, 82-1024), vs. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Defendants-Appellants (81-1750, 82-1024).

Monex International, Ltd., Plaintiff-Appellee (81-1803), vs. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, and George H. Painter, Administrative Law Judge, Defendants-Appellants (81-1803). Nos. 81-1750, 82-1024, 81-1803.

Filed: May 3, 1982.

Before: LIVELY and MERRITT, Circuit Judges; WEICK, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT,
John P. Hehman, Clerk,
/s/ John P. Hehman, Clerk

Issued as Mandate: June 9, 1982

COSTS: Pending

APPENDIX E.

Summary of June 2, 1982, Conference.

United States of America Before the Commodity Futures Trading Commission.

In the Matter of: First National Monetary Corp., and Monex International, Ltd., Respondents. CFTC Docket Nos. 79-56; 79-57.

Filed: June 7, 1982.

At the request of the presiding judge, an informal conference was convened at 10:00 a.m. on June 2, 1982. The parties were advised of their right to have a reporter present during this conference, but no such request was made. The informal conference was called in order ". . . to hear the views of the parties on the possible outcome of these proceedings, and the ramifications thereof."

At the opening of the conference, the presiding judge stated that the conference was essentially a last ditch effort to determine whether or not any reasonable basis existed for settling the issues in the proceeding. I noted that my general impression was that counsel for Monex appeared to be less intractable than counsel for FNMC and the Division, and I urged counsel for Monex to take the initiative in proposing a settlement immediately after the conclusion of the chambers conference. I noted that a decision adverse to Respondents could result in a deluge of Section 14 type hearings, and that I did not relish the prospect of a large number of *Matthews v. Monex* type hearings.

Counsel for Respondents have expressed the view to me that the Division attorneys are and have been extremely reluctant to discuss settlement, and that the Division attorneys prefer that settlement negotiations be done on a formal rather than an informal basis. Lead counsel for the Division was asked whether the scheduled hearing would be necessary if Respondents conceded that the contracts in issue

constituted a violation of Section 4h of the Act, and that Respondents would modify the contracts to conform to the Division's perception of a "leverage" contract. Lead counsel for the Division objected to the question, and there was no substantive response.

At one point during the conference, Mr. Tucker defended the presiding judge's Stay Order of October 2, 1980, and criticized the Commission's Order of May 1, 1981. My recollection is that Mr. Tucker professed not to grasp the import of the Commission's May 1 Order, and I attempted to clarify the matter for him by explaining that the Commission appears to see a distinction between the contracts in issue and "leverage" contracts.

During the conference, I commented that I would be more comfortable if this proceeding were akin to a rulemaking proceeding. There followed a colloquy between Mr. Silver and Mr. Seifert on this point.

Terms of a possible settlement were not discussed except for the question propounded to Mr. Seifert. At approximately 10:45 a.m., I urged the parties to engage in serious settlement negotiations, and that was agreed to by the parties. Counsel for one of the Respondents requested an opportunity to reconvene in the afternoon, and this matter was left open. There was no request from the parties to reconvene.

Dated this 7th day of June 1982
/s/ George H. Painter
George H. Painter
Administrative Law Judge

APPENDIX F.

Transcript of Proceedings.

United States of America Before the Commodity Futures Trading Commission.

In the Matter of: First National Monetary Corp., and Monex International., Ltd., Respondents. CFTC Docket Nos. 79-56, 79-57.

Washington, D.C. June 14, 1982.

Before: GEORGE H. PAINTER, Administrative Law Judge.

JUDGE PAINTER: Is it Article I or Article III, Mr. Silver?

MR. SILVER: That is my next motion, Your Honor.

JUDGE PAINTER: Well, the motion is considered and after appropriate consideration, denied.

MR. SILVER: We wish to move to dismiss on the grounds, Your Honor, that you are not an Article III judge under the Constitution of the United States.

JUDGE PAINTER: Considered and denied.

MR. SILVER: We would reassert, Your Honor, the motion for summary judgment on the grounds that this proceeding is both in violation of the Administrative Procedures Act and, more particularly, that this proceeding is an unlawful adjudicatory proceeding and should have been a rulemaking proceeding because it affects the industry. It is a rule of industrywide application.

JUDGE PAINTER: I have expressed by views on that matter, but the motion is denied.

MR. TUCKER: Your Honor, one last motion before we commence with the opening statements. And I do thank the Court for being tolerant of the aggressive advocates' litany of motions this morning.

The final issue is one which the Court addressed in passing during the status conference, but is not reflected in the status notes. There are pled by both respondents in these proceedings as defenses constitutional questions concerning the Act itself and the regulations, or lack thereof, under the Act. We intend to prove here today, and for the duration of these proceedings, that the Commodity Exchange Act, and, specifically, the definitions thereunder, are unconstitutionally vague. We have also pled several other constitutional infirmities. The Court may save time if the Court would opine whether the Court possesses the power or is without power to address constitutional issues at this hearing, and I ask this Court for clarification, if the Court would so choose at this time.

JUDGE PAINTER: I believe it is entirely appropriate for you to raise the constitutional issues, and I find that I do not have any authority to declare a regulation as unconstitutional or a section of the Act as unconstitutional.

MR. TUCKER: Thank you.

JUDGE PAINTER: Now, opening statements, Mr. Seifert.

MR. SEIFERT: Your Honor, I thank you for the opportunity to speak. I will be brief because I am of the view we should take advantage of this opportunity, after three years of pendency of this action, to introduce evidence and cease with argument.

As Your Honor has noted, the charge in this case is whether respondents have violated Section 4(h) of the Act in selling contracts for future delivery of commodities, other. . . .

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ALEXANDER L. STEVAS,
CLERK

No. 82-392

In the Supreme Court of the United States

OCTOBER TERM, 1982

MONEX INTERNATIONAL, LTD., AND FIRST NATIONAL MONETARY CORPORATION, PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the issuance of an administrative complaint by the Commodity Futures Trading Commission is "final agency action" reviewable pursuant to 5 U.S.C. 704.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 677 F. 2d 522.

JURISDICTION

The opinion and judgment of the court of appeals (Pet. App. 32) was entered May 3, 1982. On June 9, 1982, the court of appeals issued an order (Pet. App. 30-31) clarifying its opinion. The petition for a writ of certiorari was filed on September 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are engaged in the purchase and sale of contracts for precious metals, principally gold and silver coins and bullion (Pet. App. 2). Among the contracts that Monex International Ltd. (Monex) sells directly to the public are

gold and silver contracts that it broadly denominates as "forward contracts" (*ibid.*). First National Monetary Corporation (FNMC) offers similar contracts for sale, although it calls them "cash forward contracts" (*ibid.*). With either a "forward" or "cash forward" contract, the customer makes a minimum deposit of about 15% of the total price of the contract, plus any other applicable charges (J.A. 861, 1196).[1] Thereafter, if a customer's equity in a contract falls below a specified maintenance level, petitioners call upon the customer to provide additional maintenance funds to restore the contract equity to a specified level (J.A. 861-862, 1196-1197). Customers may liquidate their contracts by effectuating offsetting transactions or, depending upon whether the contract is for the purchase or sale of metal, at maturity can either make or take delivery of the actual gold or silver coins or bullion (J.A. 862, 1197).

The Commodity Futures Trading Commission is charged, *inter alia*, with the responsibility of regulating "transactions involving contracts of sale of a commodity for future delivery * * *." 7 U.S.C. (Supp. IV) 2. These "futures" contracts are subject to extensive administrative oversight, and may be executed only on regulated exchanges designated by the Commission as contract markets. 7 U.S.C. 6h; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, No. 80-203 (May 3, 1982), slip op. 4-7 & n.14. On August 8, 1979, the Commission issued administrative complaints against Monex (J.A. 860-866) and FNMC (J.A. 1195-1201) alleging that their "forward" and "cash forward" contracts were contracts for future delivery of a commodity (J.A. 862, 1197), and charging that petitioners had violated the Commodity Exchange Act by executing or consummating such contracts other than by or through a member of a contract

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[1] "J.A." refers to the joint appendix in the court of appeals.

market, in violation of Section 4h of the Act, 7 U.S.C. 6h (J.A. 862-863, 1197-1198). The complaints were issued pursuant to Sections 6(b), 6(c), and 8a(3) of the Commodity Exchange Act, 7 U.S.C. 9, 13b, and 12a(3).

In their answers to the administrative complaints, petitioners generally denied the allegations against them and raised numerous affirmative defenses. One of their principal contentions was that their so-called "forward" and "cash forward" contracts were not futures contracts under Section 4h of the Act, 7 U.S.C. 6h, but rather were "leverage" contracts subject to Section 19 of the Act, 7 U.S.C. (Supp. IV) 23.[2] Prior to the filing of the administrative complaints, a rulemaking proceeding had been commenced to consider the Commission's proposal to regulate "leverage" contracts under Section 19 of the Act as contracts for future delivery (J.A. 1547-1548 n.1).[3] Petitioners moved the

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[2]The Act provides for alternative approaches to regulation of leverage contracts under Section 19, 7 U.S.C. (Supp. IV) 23. Subsections 19(b) and (c) permit the Commission to govern leverage contracts through a regulatory scheme designed solely for leverage transactions, 7 U.S.C. (Supp. IV) 23(b) and (c). Subsection 19(d), however, provides that if the Commission determines that any leverage transaction is a contract for future delivery within the meaning of the Act, such a transaction shall be regulated in accordance with the generally applicable provisions of the Act governing futures trading. 7 U.S.C. (Supp. IV) 23(d).

[3]That rulemaking proceeding concerned solely the Commission's proposal to regulate certain "leverage" contracts as futures contracts under the Act (J.A. 1547-1548 n.1) and did not purport to define "leverage" contracts (see 44 Fed. Reg. 13494 *et seq.* (1979)). The Commission intended to make that determination on October 1, 1982 (J.A. 1547). The Commission, however, is currently subject to reauthorization review by Congress. Among other matters under consideration by Congress is the appropriate regulatory scheme for "leverage" contracts. See 128 Cong. Rec. H7523 (daily ed. Sept. 23, 1982); H.R. Rep. No. 97-565 (Pt. 1), 97th Cong., 2d Sess. 22-23, 108-114 (1982); S. Rep. No. 97-384, 97th Cong., 2d Sess. 51-53, 177-178 (1982). Accordingly, the Commission's rulemaking efforts with respect to "leverage" contracts have been deferred pending the conclusion of congressional reauthorization proceedings.

administrative law judge for a stay of the adjudicatory proceedings against them pending completion of the Commission's "leverage" contract rulemaking proceeding. The administrative law judge granted this request on October 2, 1980. The Commission, however, on May 1, 1981, reversed the stay of the ALJ on interlocutory appeal (J.A. 1552). The Commission rejected the ALJ's implicit conclusion that the "forward" or "cash forward" contracts sold by petitioners are "leverage" contracts of the type involved in the Commission's rulemaking proceeding (J.A. 1551). The Commission concluded that this assumption was erroneous because "the entire theory of the administrative complaint is that [petitioners'] 'cash forward contracts' are contracts for future delivery, not leverage contracts" (*ibid.*). The Commission therefore vacated the ALJ's stay of the administrative proceedings and remanded the matter for further hearings before the ALJ.[4]

Before the administrative hearings in this matter could proceed, however, petitioners filed the present litigation. On November 18, 1981, FNMC sought injunctive and declaratory relief in the United States District Court for the Eastern District of Michigan against any further prosecution of the administrative proceeding. Monex filed a similar complaint that same day in the United States District Court for the Central District of California. Each complaint essentially presented the same contentions previously raised in the administrative proceedings. Both district courts

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[4]On remand, the Chief Administrative Law Judge, who was previously assigned to the case, recused himself and the matter was assigned to another ALJ. This recusal and substitution forms the basis for many of petitioners' general allegations of procedural unfairness (Pet. 8, 16). Petitioners have repeatedly claimed, without substantiation, that they will not receive a fair hearing before the ALJ (*ibid.*). On December 17, 1981, the district court, without hearing any evidence on the subject, apparently adopted petitioners' assertions on this issue (see Pet. App. 25).

issued temporary restraining orders against continuation of the administrative proceedings, and the California action was transferred to the Michigan district court.[5]

On December 17, 1981, after oral argument but without hearing any testimony, the district court rendered a decision from the bench that preliminarily enjoined the Commission from prosecuting the administrative proceeding instituted against petitioners. The district court held that the Commission's issuance of the administrative complaints was a final agency decision to proceed against petitioners by adjudication rather than by rulemaking. The court therefore concluded that the issuance of the complaints was final agency action reviewable under Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704 (Pet. App. 19). The district court further held that the Commission had abused its discretion in deciding to proceed against petitioners by adjudication rather than by rulemaking (*id.* at 23-24). The district court then concluded, after merely cataloguing the "allegations" (*id.* at 25) and "claims" (*ibid.*) advanced by the petitioners, that there was a "possibility" that the petitioners would suffer irreparable harm if the administrative proceeding was not enjoined (*id.* at 26). The district court's oral opinion was later incorporated into a formal preliminary injunction entered on December 29, 1981.

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[5]The original temporary restraining order entered by the Michigan district court was appealed to the United States Court of Appeals for the Sixth Circuit. By order dated December 10, 1981, the court of appeals stayed the order of the district court. The court of appeals concluded that the temporary restraining order impermissibly exceeded the 20-day limitation of Fed. R. Civ. P. 65(b), and was therefore an appealable preliminary injunction (28 U.S.C. 1292(a)(1)). The injunction was stayed because of the district court's failure to support the injunction with findings of fact and conclusions of law as required by Fed. R. Civ. P. 65(d).

By order dated March 31, 1982, the court of appeals vacated the preliminary injunction entered by the district court (Pet. App. 29). In an opinion issued May 3, 1982, the court explicated the reasons for its actions (Pet. App. 1-10). The court of appeals concluded that the mere filing of an administrative complaint is not a "final agency action" reviewable in federal court under 5 U.S.C. 704 (Pet. App. 5-6), and rejected the contention that the complaints in this case were so plainly beyond the Commission's power that a court should intervene at the outset to declare the proceedings a nullity (*id.* at 6). The court reasoned that it could not assume, as the district court apparently had (*id.* at 6-7), "that the administrative agency will act illegally, that a retroactive order will be entered punishing [petitioners] unfairly and that they will be harmed irreparably before they can obtain judicial review and redress" (*id.* at 6). The court noted that any contrary findings by the district court "are clearly erroneous and wholly unsupported by the present record" (*id.* at 7). As for petitioners' arguments that the Commission must proceed by rulemaking rather than adjudicatory proceedings, the court of appeals correctly concluded that the " 'choice made between proceedings by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administra-[tive] agency' " (*id.* at 9, quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947)). The court of appeals denied petitioners' subsequent motions for a stay of its mandate and decision.[6]

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[6]As noted by petitioners (Pet. 13), the Commission did file a petition for rehearing with the court of appeals. The Commission, however, did not argue that the court of appeals' holding "was incorrect" (*ibid.*). The primary purpose of the petition was to clarify a somewhat confusing statement contained in the court's opinion. In the administrative proceedings and before the district court, petitioners had argued that their "forward" and "cash forward" contracts were "leverage" contracts controlled by the Commission's "leverage" contract rulemaking. In its

Following the issuance of the court of appeals' decision, the ALJ notified the parties that he intended to proceed with the administrative hearing. By April 21, 1982, all parties agreed to a hearing date of June 14, 1982. Despite last minute efforts by petitioners to prevent the administrative hearing,[7] the administrative proceeding progressed in an orderly fashion. The hearing commenced as scheduled on June 14, 1982, and concluded on July 2, 1982; the parties are now in the process of filing post-hearing briefs and proposed findings of fact.

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opinion the court of appeals inadvertently equated "forward" and "cash forward" contracts with "leverage" contracts (Pet. App. 4), and the Commission sought clarification of this point so that petitioners could not contend in the administrative proceeding that the court of appeals had held that their contracts were indeed "leverage" contracts. On June 9, 1982, the court of appeals issued an order (Pet. App. 30-31) clarifying this ambiguity, explicitly stating that the legal character of petitioners' contracts "is an issue to be resolved in the administrative adjudicatory proceeding" (*ibid.*).

[7]On June 1, 1982, petitioners unsuccessfully applied to Justice O'Connor for a stay of the court of appeals' mandate and March 31, 1982 Order (No. A-1041). Petitioners thereafter presented their stay application to Justice Rehnquist. Pursuant to the practice of the Court, the application was referred for consideration by the entire Court, and was denied on June 28, 1982. On June 10, 1982, four days before the administrative proceeding began, a hearing was held before the district court at petitioners' request to consider their motion for summary judgment. Petitioners contended, as they do in this Court (see, *e.g.*, Pet. 3-4), that the term "contracts of sale of a commodity for future delivery" in Section 2(a)(1) of the Act, 7 U.S.C. (Supp. IV) 2, and the proscriptions of Section 4h of the Act, 7 U.S.C. 6h, are unconstitutionally vague and overbroad. The district court denied the motion in an oral opinion rendered from the bench at the conclusion of the hearing. The court concluded that it was "clear[] that the opinion of the Sixth Circuit Court of Appeals * * * mandates the denial of summary judgment" because of the "numerous and broad authority for the proposition that a Court should not rule on the constitutionality of a statute or agency until the agency has in fact acted" (Civ. No. 81-74572, E.D. Mich., June 10, 1982 Tr. 25-27). On October 7, 1982, the district court rendered an opinion from the bench granting the government's motion to dismiss without prejudice.

ARGUMENT

The opinion of the court of appeals is in complete accord with the decisions of this and other federal courts that have addressed the proper scope of judicial review of administrative action. Further review by this Court is therefore unwarranted.

1. The court of appeals held that the Commission's mere issuance of an administrative complaint is not reviewable under Section 10(c) of the Administrative Procedure Act. That statute provides for review of any "final agency action." 5 U.S.C. 704. The court of appeals' conclusion is mandated by this Court's recent unanimous decision in *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232 (1980) (*Socal*), which held that the issuance of an administrative complaint by the Federal Trade Commission does not constitute final agency action reviewable under 5 U.S.C. 704.

Petitioners attempt to distinguish *Socal* by arguing that "*Socal* does not prohibit judicial review of a claim that the agency is acting in excess of its authority by filing an administrative complaint" (Pet. 21). The distinction is without merit. As the court of appeals noted (Pet. App. 5), a similar argument was made and rejected in *Socal*. The claim in that case "was that the agency acted beyond its delegated authority in issuing the complaint because it had not made necessary precomplaint findings" (*ibid.*). The Court rejected that argument in *Socal* partly because judicial intervention "denies the agency an opportunity to correct its own mistakes" and results in inefficient and perhaps unnecessary piecemeal review. 449 U.S. at 242-243.

There is, however, a more fundamental concern behind this Court's rejection of the argument pressed by petitioners. The Court rejected the jurisdictional argument raised in *Socal* and renewed by petitioners here because "every

respondent to a Commission complaint could make the claim that Socal had made. Judicial review * * * should not be a means of turning prosecutor into defendant before adjudication concludes." *Socal, supra,* 449 U.S. at 242-243. The pragmatic considerations justifying that conclusion are amply illustrated by the course of events in this case. By pursuing their claim that the Commission exceeded its authority in issuing an administrative complaint against them, petitioners were able to thwart the commencement of an administrative hearing for nearly seven months.

The arguments raised by petitioners, moreover, are hardly unique to this case. Acceptance of petitioners' contentions would provide respondents in adjudicatory proceedings with immediate access to judicial review of any administrative complaint on the ground that the agency should be required to proceed instead by rulemaking procedures. If agencies were required to defend actions in federal court on that issue as a matter of course, the administrative process could not function as required by Congress. See *Socal, supra,* 449 U.S. at 242-243. See also B. Schwartz, *Administrative Law* § 45, at 115 (1976) (acceptance of such jurisdictional arguments "will readily enable those subject to administrative authority unduly to delay investigations into their affairs").

Furthermore, contrary to the assertions of petitioners (Pet. 21-23), none of the cases cited by them establish a conflict between the circuits regarding the proper application of *Socal* to the facts in this case. Petitioners' reliance on *United States* v. *Cabrini Medical Center,* 639 F. 2d 908 (2d Cir. 1981), is misplaced. In contrast to the present litigation, *Cabrini* was an action *commenced by the government* to enforce an administrative subpoena duces tecum in a pending investigation of employment practices at the Cabrini Medical Center by the Department of Health and Human Services (HHS). *United States* v. *Cabrini Medical Center,*

497 F. Supp. 95 (S.D.N.Y. 1980), rev'd, 639 F. 2d 908 (2d Cir. 1981). The medical center defended against enforcement of the subpoena on the ground that HHS lacked statutory authority to conduct the investigation. 497 F. Supp. at 96; 639 F. 2d at 909. In that procedural context, it was entirely within the authority of the district court and court of appeals to consider whether the matter under inquiry exceeded the "investigatory power" of the administrative agency. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950). In *Cabrini*, the court concluded that the HHS subpoena exceeded the investigatory authority of the agency because the hospital's receipt of federal funds was not in any way related to the hospital's employment practices—which were the target of the investigation.

In contrast to subpoena enforcement cases like *Cabrini*, *Socal* and the present case both involve actions brought by private parties to enjoin pending administrative adjudicatory proceedings. The doctrines of administrative finality and exhaustion of administrative remedies clearly apply in these actions. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). The court of appeals' application of *Socal* to the facts of this case does not conflict with *Cabrini*, because the imperatives of finality and exhaustion of administrative remedies that dictated the results in *Socal* and this case simply were not controlling in the context of a government subpoena enforcement action.[8]

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[8]Moreover, unlike the claims raised in *Cabrini*, petitioners here have challenged only the discretion of the Commission to proceed against them by administrative complaint rather than by rulemaking (Pet. 16). They cannot seriously argue, as the contestants did in *Cabrini* (639 F. 2d at 910), that the Commission lacks statutory authority to file the complaints. Even the district court in this case acknowledged this distinction: "there is no question the Commission has authority to issue the type of complaint it is [*sic*] issued" (Pet. App. 17).

The other cases relied upon by petitioners are also unavailing. *Touche Ross & Co.* v. *SEC*, 609 F. 2d 570, 577 (2d Cir. 1979), does not support petitioners' claim that the "lack of agency authority to order an administrative proceeding" (Pet. 22) is judicially cognizable prior to completion of the administrative proceeding. In *Touche Ross* the court of appeals was faced with the question whether the SEC was statutorily authorized to issue and enforce rules of practice. Because the issue was "one of purely statutory interpretation" (609 F. 2d at 577), the court concluded that it would review the appellants' claim that the SEC lacked authority to promulgate and enforce such rules of practice. Significantly, the court concluded that appellants must exhaust their administrative remedies before obtaining judicial review of their other claims, "including their claim that the Commission is acting with bias and will not afford them a fair hearing in accordance with due process" (609 F. 2d at 582). Petitioners here do not raise pure issues of statutory construction, but instead question the discretion of the Commission to proceed in this case by adjudicatory proceedings rather than by rulemaking. Judicial resolution of this issue necessarily depends upon facts that can only be developed during the challenged administrative proceeding. Significantly, petitioners also rely heavily upon assertions of bias and denial of due process—issues that the court in *Touche Ross* specifically reserved for judicial review after complete exhaustion of administrative remedies (609 F. 2d at 582).

Jewel Companies, Inc. v. *FTC*, 432 F. 2d 1155 (7th Cir. 1970), likewise does not support the broad proposition for which it is cited by petitioners (Pet. 22). That case held that a court could immediately review whether a Commissioner of the Federal Trade Commission properly had construed his discretion in voting to issue an administrative complaint (432 F. 2d at 1159). Apart from the fact that this holding

has no direct relevance to petitioners' claims, the result reached by the court in *Jewel* is highly doubtful in light of this Court's subsequent decision in *Socal, supra*. One of the principal grounds for the decision in *Jewel* was the concern that unless the decision to issue the complaint was reviewed prior to the administrative adjudication, the issue would escape review entirely. 432 F. 2d at 1159. However, this Court when faced with a nearly identical argument in *Socal* rejected such concerns as a basis for immediate judicial review. *Socal, supra,* 449 U.S. at 244-245.

Gulf Oil Corp. v. *DOE,* 663 F. 2d 296 (D.C. Cir. 1981), is cited by petitioners to support their assertion that *Socal* does not "preclude judicial intervention to review the procedural fairness of an ongoing adjudicatory proceeding" (Pet. 22; footnote omitted). Petitioners, however, fail to describe the type of extraordinary circumstances present in *Gulf Oil* that were found to justify intervention into the DOE's ongoing adjudicatory proceeding. In *Gulf Oil* there was substantial and uncontroverted evidence that Department of Energy employees deliberately destroyed numerous documents in order to prevent their falling into the hands of their opponents during discovery. Petitioners have made no showing of such extraordinary misconduct in this case. Accordingly, *Gulf Oil* provides no basis for disregarding the ordinary rule that errors in the administrative proceedings can adequately be cured on judicial review. See 663 F. 2d at 311, citing *Socal, supra,* 449 U.S. at 245.[9]

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[9]Similarly, the court in *Amos Treat & Co.* v. *SEC,* 306 F. 2d 260 (D.C. Cir. 1962), intervened in an ongoing administrative proceeding only because one of the Commission members had previously served on the prosecuting staff of the SEC at the time the administrative action was commenced. The court concluded that these circumstances, where one man had served as prosecutor, judge and jury, resulted in a fundamental denial of due process, justifying extraordinary judicial intervention (306 F. 2d at 266). Petitioners simply have failed to show similar egregious circumstances justifying judicial intervention in this case.

The court of appeals properly refused to intrude upon a non-final, on-going administrative proceeding. Petitioners have cited no case that conflicts with this unremarkable and eminently sound ruling.[10] Further review by this Court is therefore unwarranted.

2. Contrary to petitioners' assertions (Pet. 13-14), the decision of the court below has little relevance to the issues decided by the Ninth Circuit in *Ford Motor Co.* v. *FTC*, 673 F. 2d 1008 (1981), petition for cert. pending, No. 82-24,[11] and *Patel* v. *Immigration and Naturalization Service*, 638 F. 2d 1199 (9th Cir. 1980). Unlike the present litigation, those cases involved review of agency adjudications where the court had final agency decisions, including complete factual administrative records, before it. Accordingly, those cases were in a procedural posture that permitted review of the issue whether the agencies had abused their discretion by imposing a certain rule of law through adjudication rather than rulemaking. The court below recognized that this distinction between *Ford* and *Patel* and the present case "is crucial" (Pet. App. 10). Because *Patel* and *Ford* involved review of final action, the court "did not have to speculate

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[10] *Reader's Digest Association* v. *FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981), also cited by petitioners (Pet. 23), offers them absolutely no support. There the district court specifically held that the Federal Election Commission is authorized to pursue an administrative investigation, without judicial interference, into whether its authorizing statute was applicable to the activities of the Reader's Digest Association (509 F. Supp. at 1214). The Commission here is similarly entitled to determine whether petitioners have violated the provisions of the Commodity Exchange Act without premature judicial interference.

[11] In July 1982, the Solicitor General filed a petition for certiorari in *Federal Trade Commission* v. *Francis Ford, Inc.*, *supra*. The question presented by that petition is whether an order of the Federal Trade Commission is unlawful because the agency failed to proceed by rulemaking rather than adjudication. The petition in *Ford*, however, may be moot. See Reply Brief for the Federal Trade Commission, No. 82-24.

about the facts, the nature of the industry, the administrative standard to be applied, the remedy or sanction to be imposed and the effect on non-parties similarly situated" (*ibid.*).

By contrast, in this case there has not been any final Commission adjudication of the complaint against Monex and FNMC, and therefore there is no decision against which the standards set forth in *Ford* and *Patel* or any other judicial opinion can be applied. Indeed, prior to a final Commission adjudication, there is no basis to conclude that the Commission's decision will be adverse to petitioners. Moreover, even assuming, *arguendo*, as petitioners assert, that *Patel* and *Ford* establish that agencies must proceed by rulemaking rather than adjudication where the administrative action "would * * * change existing law and have widespread application" (Pet. 13-14), the court of appeals correctly concluded that such a test cannot be applied until after completion of the challenged administrative proceeding. It would be impossible for a court to determine, before the fact, whether the adjudicatory proceedings in this case will change existing law or have widespread application.[12]

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[12]In this case, for example, the Commission could conceivably conclude that petitioners' "forward" and "cash forward" contracts are not "futures" contracts, thus leaving the law applicable to this case essentially unchanged. A conclusion that petitioners' "forward" or "cash forward" contracts are "futures" contracts, furthermore, may have no widespread significance. This case, therefore, does not present the issues decided in *Patel* and *Ford*. Accordingly, there is no need to hold the present petition pending this Court's consideration of the petition in *Ford*. Whatever the eventual outcome of the *Ford* litigation, it is simply inapplicable in this case until the completion of the administrative proceedings against petitioners.

Thus, even assuming that *Patel* and *Ford* state a correct proposition of law, the cases do not justify the judicial intervention sought by petitioners here.[13]

3. Petitioners' claim that certiorari should be granted to prevent the Commission from proceeding with "a presumptively illegal administrative adjudication" (Pet. 23) is entirely unfounded. The Commission's decision to proceed against petitioners by means of an adjudicatory proceeding is not "presumptively illegal." To the contrary, the choice between rulemaking and adjudication is committed to the reasonable discretion of administrative agencies, and is presumptively valid. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766, 772 (1969); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201-203 (1947). In *SEC* v. *Chenery Corp.*, *supra*, 332 U.S. at 203, the Court held that "[t]here is * * * a very definite place for the case-by-case evolution of statutory standards," and the "choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."

Applicants do not respond to these well-settled propositions of administrative law, but merely cite the lower court rulings in *Patel*, *supra*, 638 F. 2d at 1199 and *Ford*, *supra*, 673 F. 2d at 1008. As explained above, however, these cases

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[13]In an attempt to create the appearance of an administrative "record" against which the standards of *Ford* and *Patel* could be applied, petitioners ask the Court to accept, as adjudicated, a host of assertions of fact and law (see, *e.g.*, Pet. 2-3, 5-8, 14 n.10, 15 & n.11, 16). The vast majority of those assertions, however, have never been adjudicated in the administrative forum. Indeed, many of them remain in dispute in the administrative proceeding. Nor could the district court's opinion (Pet. App. 11-28) be reasonably construed to have made any such findings of fact or law. Significantly, petitioners cite no record or other authority for their assertions.

do not justify the judicial intervention sought by petitioners at the very outset of the administrative proceedings in this case.[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14]The final issue tendered by petitioners for review is what they term the court of appeals' "radical[]" departure from the usual course of review in reversing the district court's preliminary injunction (Pet. 25). This issue clearly does not merit the attention of the Court. The court of appeals, after careful review of the record in the district court, concluded that the district court erred in holding that the issuance of an administrative complaint constituted reviewable final agency action under the Administrative Procedure Act (Pet. App. 5-6), and further found no evidence of irreparable injury or other procedural irregularity requiring judicial intervention into an ongoing administrative proceeding (*id.* at 7-10).

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